UNITED STATES REPORTS

VOLUME 504

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1991

MAY 4 THROUGH JUNE 17, 1992

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

482 U. S. 115, n. 18, line 3: "155–156" should be "195–196".
2 Dall. 402, line 19: "Braislford" should be "Brailsford".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
THURGOOD MARSHALL, Associate Justice.

OFFICERS OF THE COURT

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KENNETH W. STARR, Solicitor General.
WILLIAM K. SUTER, Clerk.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. VI, and 501 U. S., p. V.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1991

KEENEY, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* TAMAYO-REYES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1859. Argued January 15, 1992—Decided May 4, 1992

In collateral state-court proceedings, respondent, a Cuban immigrant with little education and almost no knowledge of English, alleged, *inter alia*, that his plea of *nolo contendere* to first-degree manslaughter had not been knowing and intelligent and therefore was invalid because his court-appointed translator had not translated accurately and completely for him the *mens rea* element of the crime in question. The state court dismissed the petition after a hearing, the Oregon Court of Appeals affirmed, the State Supreme Court denied review, and the Federal District Court denied respondent habeas corpus relief. However, the Court of Appeals held that he was entitled to a federal evidentiary hearing on the question whether the *mens rea* element of the crime was properly explained to him, since the record disclosed that the material facts concerning the translation were not adequately developed at the state-court hearing, see *Townsend* v. *Sain*, 372 U. S. 293, 313, and since postconviction counsel's negligent failure to develop those facts did not constitute a deliberate bypass of the orderly procedure of the state courts, see *id.*, at 317; *Fay* v. *Noia*, 372 U. S. 391, 438.

Held: A cause-and-prejudice standard, rather than *Fay*'s deliberate bypass standard, is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings. *Townsend*'s holding that the *Fay* standard is applicable in a case like this must be overruled in light of more recent decisions involving, like *Fay*, a

Syllabus

state procedural default, in which this Court has rejected the deliberate bypass standard in favor of a standard of cause and prejudice. See, *e. g., Wainwright* v. *Sykes*, 433 U. S. 72, 87–88, and n. 12; *Coleman* v. *Thompson*, 501 U. S. 722, 751. It would be irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim, and to apply to the latter a remnant of a decision that is no longer upheld with regard to the former. Moreover, the concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum that motivated the rejection of the *Fay* standard in the state procedural default cases are equally applicable to this case. Finally, applying the cause-and-prejudice standard here also advances uniformity in habeas corpus law. Thus, respondent is entitled to a federal evidentiary hearing if he can show cause for his failure to develop the facts in the state-court proceedings and actual prejudice resulting from that failure, or if he can show that a fundamental miscarriage of justice would result from failure to hold such a hearing. See, *e. g., McCleskey* v. *Zant*, 499 U. S. 467, 494. Pp. 5–12.

926 F. 2d 1492, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and KENNEDY, JJ., joined, *post*, p. 12. KENNEDY, J., filed a dissenting opinion, *post*, p. 24.

Jack L. Landau, Deputy Attorney General of Oregon, argued the cause for petitioner. With him on the briefs were *Charles S. Crookham*, Attorney General, *Dave Frohnmayer*, Former Attorney General, *Virginia L. Linder*, Solicitor General, and *Brenda J. Peterson* and *Rives Kistler*, Assistant Attorneys General.

Steven T. Wax argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *George Williamson*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Dane R. Gillette* and *Joan Killeen Haller*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Larry EchoHawk* of Idaho, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *Robert J. Del Tufo* of New Jersey, *Lacy*

JUSTICE WHITE delivered the opinion of the Court.

Respondent is a Cuban immigrant with little education and almost no knowledge of English. In 1984, he was charged with murder arising from the stabbing death of a man who had allegedly attempted to intervene in a confrontation between respondent and his girlfriend in a bar.

Respondent was provided with a defense attorney and interpreter. The attorney recommended to respondent that he plead *nolo contendere* to first-degree manslaughter. Ore. Rev. Stat. § 163.118(1)(a) (1987). Respondent signed a plea form that explained in English the rights he was waiving by entering the plea. The state court held a plea hearing, at which petitioner was represented by counsel and his interpreter. The judge asked the attorney and interpreter if they had explained to respondent the rights in the plea form and the consequences of his plea; they responded in the affirmative. The judge then explained to respondent, in English, the rights he would waive by his plea, and asked the interpreter to translate. Respondent indicated that he understood his rights and still wished to plead *nolo contendere*. The judge accepted his plea.

Later, respondent brought a collateral attack on the plea in a state-court proceeding. He alleged his plea had not been knowing and intelligent and therefore was invalid because his translator had not translated accurately and completely for him the *mens rea* element of manslaughter. He also contended that he did not understand the purposes of the plea form or the plea hearing. He contended that he did not know he was pleading no contest to manslaughter, but rather that he thought he was agreeing to be tried for manslaughter.

H. Thornburg of North Carolina, *Ernest D. Preate, Jr.*, of Pennsylvania, *Charles W. Burson* of Tennessee, and *Kenneth O. Eikenberry* of Washington; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

After a hearing, the state court dismissed respondent's petition, finding that respondent was properly served by his trial interpreter and that the interpreter correctly, fully, and accurately translated the communications between respondent and his attorney. App. 51. The State Court of Appeals affirmed, and the State Supreme Court denied review.

Respondent then entered Federal District Court seeking a writ of habeas corpus. Respondent contended that the material facts concerning the translation were not adequately developed at the state-court hearing, implicating the fifth circumstance of *Townsend* v. *Sain*, 372 U. S. 293, 313 (1963), and sought a federal evidentiary hearing on whether his *nolo contendere* plea was unconstitutional. The District Court found that the failure to develop the critical facts relevant to his federal claim was attributable to inexcusable neglect and that no evidentiary hearing was required. App. to Pet. for Cert. 37, 38. Respondent appealed.

The Court of Appeals for the Ninth Circuit recognized that the alleged failure to translate the *mens rea* element of first-degree manslaughter, if proved, would be a basis for overturning respondent's plea, 926 F. 2d 1492, 1494 (1991), and determined that material facts had not been adequately developed in the state postconviction court, *id.*, at 1500, apparently due to the negligence of postconviction counsel. The court held that *Townsend* v. *Sain*, *supra*, at 317, and *Fay* v. *Noia*, 372 U. S. 391, 438 (1963), required an evidentiary hearing in the District Court unless respondent had deliberately bypassed the orderly procedure of the state courts. Because counsel's negligent failure to develop the facts did not constitute a deliberate bypass, the Court of Appeals ruled that respondent was entitled to an evidentiary hearing on the question whether the *mens rea* element of first-degree manslaughter was properly explained to him. 926 F. 2d, at 1502.[1]

[1] With respect to respondent's claim that the plea form and plea proceeding were not adequately translated, the Court of Appeals concluded that state postconviction proceedings afforded petitioner ample opportunity to

We granted certiorari to decide whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings. 502 U. S. 807 (1991). We reverse.

Because the holding of *Townsend* v. *Sain* that *Fay* v. *Noia*'s deliberate bypass standard is applicable in a case like this had not been reversed, it is quite understandable that the Court of Appeals applied that standard in this case. However, in light of more recent decisions of this Court, *Townsend*'s holding in this respect must be overruled.[2] *Fay* v.

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contest the translations, that the material facts surrounding these issues were adequately developed, and that the state court's findings were adequately supported by the record. The Court of Appeals therefore held that a federal evidentiary hearing on that claim was not required. 926 F. 2d, at 1502.

[2] JUSTICE O'CONNOR asserts that *Townsend* v. *Sain*, 372 U. S. 293 (1963), insofar as relevant to this case, merely reflected existing law. The claim thus seems to be that the general rule stated by the Court in *Townsend* governing when an evidentiary hearing must be granted to a federal habeas corpus petitioner, as well as each of the Court's six criteria particularizing its general pronouncement, reflected what was to be found in prior holdings of the Court. This is a very doubtful claim. Surely the Court at that time did not think this was the case, for it pointedly observed that prior cases had not settled all aspects of the hearing problem in habeas proceedings and that the lower federal courts had reached widely divergent and irreconcilable results in dealing with hearing issues. *Id.*, at 310, and n. 8. Hence it deemed it advisable to give further guidance to the lower courts. It also expressly stated that the rules it was announcing "must be considered to supersede, to the extent of any inconsistencies, the opinions in *Brown* v. *Allen*[, 344 U. S. 443 (1953)]." *Id.*, at 312. This was necessary because *Brown* was inconsistent with the holding of *Townsend* regarding habeas petitioners who failed to adequately develop federal claims in state-court proceedings. See *Brown* v. *Allen*, 344 U. S. 443, 465 (1953) (federal court may deny writ without rehearing of facts "where the legality of [the] detention has been determined, *on the facts presented*," by the state court) (emphasis added); *id.*, at 463 (writ should be refused, without more, if federal court satisfied from the record that "state process has given fair consideration to the issues and the *offered* evidence") (emphasis added). We have unequivocally acknowledged that *Townsend* substantially changed the availability of evidentiary hearings in federal

Noia was itself a case where the habeas petitioner had not taken advantage of state remedies by failing to appeal—a procedural default case. Since that time, however, this Court has rejected the deliberate bypass standard in state procedural default cases and has applied instead a standard of cause and prejudice.

In *Francis* v. *Henderson*, 425 U. S. 536 (1976), we acknowledged a federal court's power to entertain an application for habeas even where the claim has been procedurally waived in state proceedings, but nonetheless examined the appropriateness of the exercise of that power and recognized, as we had in *Fay*, that considerations of comity and concerns for the orderly administration of criminal justice may in some circumstances require a federal court to forgo the exercise of its habeas corpus power. 425 U. S., at 538–539. We held that a federal habeas petitioner is required to show cause for his procedural default, as well as actual prejudice. *Id.*, at 542.

In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), we rejected the application of *Fay*'s standard of "knowing waiver" or "deliberate bypass" to excuse a petitioner's failure to comply with a state contemporaneous-objection rule, stating that the state rule deserved more respect than the *Fay* standard accorded it. 433 U. S., at 88. We observed that procedural rules that contribute to error-free state trial proceedings are thoroughly desirable. We applied a cause-and-prejudice standard to a petitioner's failure to object at trial and limited

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habeas proceedings. See *Smith* v. *Yeager*, 393 U. S. 122, 125 (1968) *(per curiam)*.

It is not surprising, then, that none of the cases cited by JUSTICE O'CONNOR remotely support *Townsend*'s requirement for a hearing in any case where the "material facts were not adequately developed at the state-court hearing" due to petitioner's own neglect. 372 U. S., at 313. Finally, it is undeniable that *Fay* v. *Noia*'s deliberate bypass standard overruled prior procedural default cases, and it is no less true that *Townsend*'s adoption of that standard as a definition of "inexcusable neglect" made new law.

Fay to its facts. 433 U. S., at 87–88, and n. 12. We have consistently reaffirmed that the "cause-and-prejudice" standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power. *Reed* v. *Ross*, 468 U. S. 1, 11 (1984); *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982).

In *McCleskey* v. *Zant*, 499 U. S. 467 (1991), we held that the same standard used to excuse state procedural defaults should be applied in habeas corpus cases where abuse of the writ is claimed by the government. *Id.*, at 493. This conclusion rested on the fact that the two doctrines are similar in purpose and design and implicate similar concerns. *Id.*, at 493–494. The writ strikes at finality of a state criminal conviction, a matter of particular importance in a federal system. *Id.*, at 491, citing *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986). Federal habeas litigation also places a heavy burden on scarce judicial resources, may give litigants incentives to withhold claims for manipulative purposes, and may create disincentives to present claims when evidence is fresh. 499 U. S., at 491–492. See also *Reed* v. *Ross*, *supra*, at 13; *Wainwright*, *supra*, at 89.

Again addressing the issue of state procedural default in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), we described *Fay* as based on a conception of federal/state relations that undervalued the importance of state procedural rules, 501 U. S., at 750, and went on to hold that the cause-and-prejudice standard applicable to failure to raise a particular claim should apply as well to failure to appeal at all. *Ibid.* "All of the State's interests—in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors—are implicated whether a prisoner defaults one claim or all of them." *Id.*, at 750. We therefore applied the cause-and-prejudice standard uniformly to state procedural defaults, eliminating the "irrational" distinction between *Fay* and subsequent cases. 501 U. S., at 751. In light of these decisions, it is similarly

irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim, and to apply to the latter a remnant of a decision that is no longer upheld with regard to the former.

The concerns that motivated the rejection of the deliberate bypass standard in *Wainwright*, *Coleman*, and other cases are equally applicable to this case.[3] As in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum.

Applying the cause-and-prejudice standard in cases like this will obviously contribute to the finality of convictions, for requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in

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[3] JUSTICE O'CONNOR puts aside our overruling of *Fay* v. *Noia*'s standard in procedural default cases on the ground that in those cases the cause-and-prejudice standard is just an acceptable precondition to reaching the merits of a habeas petitioner's claim, but insists that applying that standard to cases in which the petitioner defaulted on the development of a claim is not subject to the same characterization. For the reasons stated in the text, we disagree. Moreover, JUSTICE O'CONNOR's position is considerably weakened by her concession that the cause-and-prejudice standard is properly applied to a factually undeveloped claim which had been exhausted but which is first asserted federally in a second or later habeas petition.

Contrary to JUSTICE O'CONNOR's view, *post*, at 17, we think it clear that the *Townsend* Court thought that the same standard used to deny a hearing in a procedural default case should be used to deny a hearing in cases described in its fifth circumstance. It is difficult to conceive any other reason for our borrowing the deliberate bypass standard of *Fay* v. *Noia*, particularly if, as the dissent seems to say, *post*, at 17, *Townsend* relied on, but did not repeat, the analysis found in *Fay* v. *Noia*. Yet the dissent insists that the rejection of *Fay* v. *Noia*'s analysis in our later cases should have no impact on a case such as we have before us now.

state-court proceedings dramatically increases the opportunities to relitigate a conviction.

Similarly, encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance. It reduces the "inevitable friction" that results when a federal habeas court "overturn[s] either the factual or legal conclusions reached by the state-court system." *Sumner* v. *Mata*, 449 U. S. 539, 550 (1981).

Also, by ensuring that full factual development takes place in the earlier, state-court proceedings, the cause-and-prejudice standard plainly serves the interest of judicial economy. It is hardly a good use of scarce judicial resources to duplicate factfinding in federal court merely because a petitioner has negligently failed to take advantage of opportunities in state-court proceedings.

Furthermore, ensuring that full factual development of a claim takes place in state court channels the resolution of the claim to the most appropriate forum. The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings. This is fully consistent with, and gives meaning to, the requirement of exhaustion. The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief. *Ex parte Royall*, 117 U. S. 241 (1886). The requirement that state prisoners exhaust state remedies before a writ of habeas corpus is granted by a federal court is now incorporated in the federal habeas statute.[4] 28 U. S. C.

[4] "An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ." 28 U. S. C. § 2254(b).

§ 2254. Exhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful.

The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court. Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits. Cf. *Picard* v. *Connor*, 404 U. S. 270, 275 (1971).

Finally, it is worth noting that applying the cause-and-prejudice standard in this case also advances uniformity in the law of habeas corpus. There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated. And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum. A different rule could mean that a habeas petitioner would not be excused for negligent failure to object to the introduction of the prosecution's evidence, but nonetheless would be excused for negligent failure to introduce any evidence of his own to support a constitutional claim.[5]

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[5] It is asserted by JUSTICE O'CONNOR that in adopting 28 U. S. C. § 2254(d) Congress assumed the continuing validity of all aspects of *Townsend*, including the requirement of a hearing in all fifth circumstance cases absent a deliberate bypass. For several reasons, we disagree. First, it is evident that § 2254(d) does not codify *Townsend*'s specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court

Respondent Tamayo-Reyes is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure. We also adopt the narrow exception

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findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Second, to the extent that it even considered the issue of default, Congress sensibly could have read *Townsend* as holding that the federal habeas corpus standard for cases of default under *Townsend*'s fifth circumstance and cases of procedural default should be the same. Third, § 2254(d) does not mention or recognize any exception for inexcusable neglect, let alone reflect the specific standard of deliberate bypass. In the face of this silence, it should not be assumed that if there is to be a judicially created standard for equitable default, it must be no other than the deliberate bypass standard borrowed by *Townsend* from a decision that has since been repudiated.

We agree with JUSTICE O'CONNOR that under our holding a claim invoking the fifth circumstance of *Townsend* will be unavailing where the cause asserted is attorney error. *Murray* v. *Carrier*, 477 U. S. 478 (1986), and *Coleman* v. *Thompson*, 501 U. S. 722 (1991), dictate as much. Such was the intended effect of those cases, but this does not make that circumstance a dead letter, for cause may be shown for reasons other than attorney error. We noted in *Murray*, a procedural default case, that objective factors external to the defense may impede counsel's efforts to comply and went on to say: "Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed* v. *Ross*, 468 U. S., at 16, or that 'some interference by officials,' *Brown* v. *Allen*, 344 U. S. 443, 486 (1953), made compliance impracticable, would constitute cause under this standard." 477 U. S., at 488. Much of the same may be said of cases where the petitioner has defaulted on the development of a claim.

Nor, to the extent it is relevant to our decision in this case, is JUSTICE O'CONNOR's argument that many forms of cause would fall under other *Townsend* circumstances persuasive. For example, the third and sixth circumstances of *Townsend* speak to the denial by a *court* of full and fair hearing; however, a situation where facts were inadequately developed because of interference from officials would fall naturally into the fifth circumstance.

to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing. Cf. *McCleskey* v. *Zant*, 499 U. S., at 494; *Murray* v. *Carrier*, 477 U. S., at 496.

The State concedes that a remand to the District Court is appropriate in order to afford respondent the opportunity to bring forward evidence establishing cause and prejudice, Brief for Petitioner 21, and we agree that respondent should have that opportunity. Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY join, dissenting.

Under the guise of overruling "a remnant of a decision," *ante*, at 8, and achieving "uniformity in the law," *ante*, at 10, the Court has changed the law of habeas corpus in a fundamental way by effectively overruling cases decided long before *Townsend* v. *Sain*, 372 U. S. 293 (1963). I do not think this change is supported by the line of our recent procedural default cases upon which the Court relies: In my view, the balance of state and federal interests regarding whether a federal court will *consider* a claim raised on habeas cannot be simply lifted and transposed to the different question whether, once the court will consider the claim, it should hold an evidentiary hearing. Moreover, I do not think the Court's decision can be reconciled with 28 U. S. C. § 2254(d), a statute Congress enacted three years after *Townsend*.

I

Jose Tamayo-Reyes' habeas petition stated that because he does not speak English he pleaded *nolo contendere* to

manslaughter without any understanding of what "manslaughter" means. App. 58. If this assertion is true, his conviction was unconstitutionally obtained, see *Henderson* v. *Morgan*, 426 U. S. 637, 644–647 (1976), and Tamayo-Reyes would be entitled to a writ of habeas corpus. Despite the Court's attempt to characterize his allegation as a technical quibble—"his translator had not translated accurately and completely for him the *mens rea* element of manslaughter," *ante*, at 3—this much is not in dispute. Tamayo-Reyes has alleged a fact that, if true, would entitle him to the relief he seeks.

Tamayo-Reyes initially, and properly, challenged the voluntariness of his plea in a petition for postconviction relief in state court. The court held a hearing, after which it found that "[p]etitioner's plea of guilty was knowingly and voluntarily entered." App. 51. Yet the record of the postconviction hearing hardly inspires confidence in the accuracy of this determination. Tamayo-Reyes was the only witness to testify, but his attorney did not ask him whether his interpreter had translated "manslaughter" for him. Counsel instead introduced the deposition testimony of the interpreter, who admitted that he had translated "manslaughter" only as "less than murder." *Id.*, at 27. No witnesses capable of assessing the interpreter's performance were called; the attorney instead tried to direct the court's attention to various sections of the interpreter's deposition and attempted to point out where the interpreter had erred. When the prosecutor objected to this discussion on the ground that counsel was not qualified as an expert witness, his "presentation of the issue quickly disintegrated." 926 F. 2d 1492, 1499 (CA9 1991). The state court had no other relevant evidence before it when it determined that Tamayo-Reyes actually understood the charge to which he was pleading.

Contrary to the impression conveyed by this Court's opinion, the question whether a federal court should defer to this sort of dubious "factfinding" in addressing a habeas corpus

petition is one with a long history behind it, a history that did not begin with *Townsend* v. *Sain*.

II

A

The availability and scope of habeas corpus have changed over the writ's long history, but one thing has remained constant: Habeas corpus is not an appellate proceeding, but rather an original civil action in a federal court. See, *e. g.*, *Browder* v. *Director, Dept. of Corrections of Ill.*, 434 U. S. 257, 269 (1978). It was settled over a hundred years ago that "[t]he prosecution against [a criminal defendant] is a criminal prosecution, but the writ of habeas corpus . . . is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right." *Ex parte Tom Tong*, 108 U. S. 556, 559–560 (1883). Any possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such nonappellate functions as the allegation of facts, 28 U. S. C. § 2242, the taking of depositions and the propounding of interrogatories, § 2246, the introduction of documentary evidence, § 2247, and, of course, the determination of facts at evidentiary hearings, § 2254(d).

To be sure, habeas corpus has its own peculiar set of hurdles a petitioner must clear before his claim is properly presented to the district court. The petitioner must, in general, exhaust available state remedies, § 2254(b), avoid procedural default, *Coleman* v. *Thompson*, 501 U. S. 722 (1991), not abuse the writ, *McCleskey* v. *Zant*, 499 U. S. 467 (1991), and not seek retroactive application of a new rule of law, *Teague* v. *Lane*, 489 U. S. 288 (1989). For much of our history, the hurdles were even higher. See, *e. g.*, *Ex parte Watkins*, 3 Pet. 193, 203 (1830) (habeas corpus available only to challenge jurisdiction of trial court). But once they have been surmounted—once the claim is properly before the dis-

trict court—a habeas petitioner, like any civil litigant, has had a right to a hearing where one is necessary to prove the facts supporting his claim. See, *e. g.*, *Hawk* v. *Olson*, 326 U. S. 271, 278–279 (1945); *Holiday* v. *Johnston*, 313 U. S. 342, 351–354 (1941); *Walker* v. *Johnston*, 312 U. S. 275, 285–287 (1941); *Moore* v. *Dempsey*, 261 U. S. 86, 92 (1923). Thus when we observed in *Townsend* v. *Sain*, 372 U. S., at 312, that "the opportunity for redress . . . presupposes the opportunity to be heard, to argue and present evidence," we were saying nothing new. We were merely restating what had long been our understanding of the method by which contested factual issues raised on habeas should be resolved.

Habeas corpus has always differed from ordinary civil litigation, however, in one important respect: The doctrine of res judicata has never been thought to apply. See, *e. g.*, *Brown* v. *Allen*, 344 U. S. 443, 458 (1953); *Darr* v. *Burford*, 339 U. S. 200, 214 (1950); *Waley* v. *Johnston*, 316 U. S. 101, 105 (1942); *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). A state prisoner is not precluded from raising a federal claim on habeas that has already been rejected by the state courts. This is not to say that state court factfinding is entitled to no weight, or that every state prisoner has the opportunity to relitigate facts found against him by the state courts. Concerns of federalism and comity have pushed us from this extreme just as the importance of the writ has repelled us from the opposite extreme, represented by the strict application of res judicata. Instead, we have consistently occupied the middle ground. Even before *Townsend*, federal courts deferred to state court findings of fact where the federal district judge was satisfied that the state court had fairly considered the issues and the evidence and had reached a satisfactory result. See, *e. g.*, *Brown*, *supra*, at 458, 465; *Frank* v. *Mangum*, 237 U. S. 309, 332–336 (1915). But where such was not the case, the federal court entertaining the habeas petition would examine the facts anew. See, *e. g.*, *Ex parte Hawk*, 321 U. S. 114, 116, 118 (1944); *Moore*, *supra*,

at 92. In *Hawk*, for example, we stated that a state prisoner would be entitled to a hearing, 321 U. S., at 116, "where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate." *Id.*, at 118. In *Brown*, we explained that a hearing may be dispensed with only "[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented." 344 U. S., at 463.

Townsend "did not launch the Court in any new directions," Weisselberg, Evidentiary Hearings in Federal Habeas Corpus Cases, 1990 B. Y. U. L. Rev. 131, 150, but it clarified how the district court should measure the adequacy of the state court proceeding. *Townsend* specified six circumstances in which one could not be confident that "the state-court trier of fact has after a full hearing reliably found the relevant facts." 372 U. S., at 313. The Court held that a habeas petitioner is entitled to an evidentiary hearing on his factual allegations if

> "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Ibid.*

That these principles marked no significant departure from our prior understanding of the writ is evident from the view expressed by the four dissenters, who had "no quarrel with the Court's statement of the basic governing principle which

should determine whether a hearing is to be had in a federal habeas corpus proceeding," but disagreed only with the Court's attempt "to erect detailed hearing standards for the myriad situations presented by federal habeas corpus applications." *Id.*, at 326–327 (Stewart, J., dissenting). *Townsend* thus did not alter the federal courts' practice of holding an evidentiary hearing unless the state court had fairly considered the relevant evidence.

The Court expressed concern in *Townsend* that a petitioner might abuse the fifth circumstance described in the opinion, by deliberately withholding evidence from the state factfinder in the hope of finding a more receptive forum in a federal court. *Id.*, at 317. To discourage this sort of disrespect for state proceedings, the Court held that such a petitioner would not be entitled to a hearing. *Ibid.* The *Townsend* opinion did not need to address this concern in much detail, because a similar issue was discussed at greater length in another case decided the same day, *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963). The *Townsend* opinion thus merely referred the reader to the discussion in *Fay*, where a similar exception was held to bar a state prisoner from habeas relief where the prisoner had intentionally committed a procedural default in state court. See *Townsend*, *supra*, at 317.

Nearly 30 years later, the Court implies that *Fay* and *Townsend* must stand or fall together. *Ante*, at 5–8. But this is not so: The *Townsend* Court did *not* suggest that the issues in *Townsend* and *Fay* were identical, or that they were so similar that logic required an identical answer to each. *Townsend* did not purport to rely on *Fay* as authority; it merely referred to *Fay*'s discussion as a shorthand device to avoid repeating similar analysis. Indeed, reliance on *Fay* as authority would have been unnecessary. *Townsend* was essentially an elaboration of our prior cases regarding the holding of hearings in federal habeas cases; *Fay* represented an overruling of our prior cases regarding procedural

defaults. See *Coleman* v. *Thompson*, 501 U. S., at 744–747; *Wainwright* v. *Sykes*, 433 U. S. 72, 82 (1977).

As the Court recognizes, *ante*, at 6, we have applied *Townsend*'s analysis ever since. See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 258 (1986); *Cuyler* v. *Sullivan*, 446 U. S. 335, 341–342 (1980); *Jackson* v. *Virginia*, 443 U. S. 307, 318 (1979); *LaVallee* v. *Delle Rose*, 410 U. S. 690, 693–694 (1973); *Boyd* v. *Dutton*, 405 U. S. 1, 3 (1972); *Procunier* v. *Atchley*, 400 U. S. 446, 451 (1971). But we have not, in my view, been unjustifiably clinging to a poorly reasoned precedent. While we properly abandoned *Fay* because it was inconsistent with prior cases that represented a better-reasoned balance of state and federal interests, the same cannot be said of *Townsend*.

The Court today holds that even when the reliability of state factfinding is doubtful because crucial evidence was not presented to the state trier of fact, a habeas petitioner is ordinarily not entitled to an opportunity to prove the facts necessary to his claim. This holding, of course, directly overrules a portion of *Townsend*, but more than that, I think it departs significantly from the pre-*Townsend* law of habeas corpus. Even before *Townsend*, when a habeas petitioner's claim was properly before a federal court, and when the accurate resolution of that claim depended on proof of facts that had been resolved against the petitioner in an unreliable state proceeding, the petitioner was entitled to his day in federal court. As Justice Holmes wrote for the Court, in a case where the state courts had rejected—under somewhat suspicious circumstances—the petitioner's allegation that his trial had been dominated by an angry mob: "[I]t does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void." *Moore*, 261 U. S., at 92. The class of petitioners eligible to present claims on habeas may have been narrower in days gone by, and the class of claims one might present may have

been smaller, but once the claim was properly before the court, the right to a hearing was not construed as narrowly as the Court construes it today.

B

Instead of looking to the history of the right to an evidentiary hearing, the Court simply borrows the cause and prejudice standard from a series of our recent habeas corpus cases. *Ante*, at 5–8. All but one of these cases address the question of when a habeas claim is properly before a federal court despite the petitioner's procedural default. See *Coleman* v. *Thompson*, *supra*; *Murray* v. *Carrier*, 477 U. S. 478 (1986); *Reed* v. *Ross*, 468 U. S. 1 (1984); *Engle* v. *Isaac*, 456 U. S. 107 (1982); *Wainwright* v. *Sykes*, *supra*; *Francis* v. *Henderson*, 425 U. S. 536 (1976). The remaining case addresses the issue of a petitioner's abuse of the writ. See *McCleskey* v. *Zant*, 499 U. S. 467 (1991). These cases all concern the question whether the federal court will *consider* the merits of the claim, that is, whether the court has the *authority* to upset a judgment affirmed on direct appeal. So far as this threshold inquiry is concerned, our respect for state procedural rules and the need to discourage abuse of the writ provide the justification for the cause and prejudice standard. As we have said in the former context: "[T]he Great Writ imposes special costs on our federal system. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, *supra*, at 128.

The question we are considering here is quite different. Here, the Federal District Court has already determined that it will consider the claimed constitutional violation; the only question is how the court will go about it. When it

comes to determining whether a hearing is to be held to resolve a claim that is already properly before a federal court, the federalism concerns underlying our procedural default cases are diminished somewhat. By this point, our concern is less with encroaching on the territory of the state courts than it is with managing the territory of the federal courts in a manner that will best implement their responsibility to consider habeas petitions. Our adoption of a cause and prejudice standard to resolve the first concern should not cause us reflexively to adopt the same standard to resolve the second. Federalism, comity, and finality are all advanced by declining to permit relitigation of claims in federal court in certain circumstances; these interests are less significantly advanced, once relitigation properly occurs, by permitting district courts to resolve claims based on an incomplete record.

III

The Court's decision today cannot be reconciled with subsection (d) of 28 U. S. C. § 2254, which Congress enacted only three years after we decided *Townsend*. Subsection (d) provides that state court factfinding "shall be presumed to be correct, unless the applicant shall establish" one of eight listed circumstances. Most of these circumstances are taken word for word from *Townsend*, including the one at issue here; § 2254(d)(3) renders the presumption of correctness inapplicable where "the material facts were not adequately developed at the State court hearing." The effect of the presumption is to augment the habeas petitioner's burden of proof. Where state factfinding is presumed correct, the petitioner must establish the state court's error "by convincing evidence"; where state factfinding is not presumed correct, the petitioner must prove the facts necessary to support his claim by only a preponderance of the evidence. *Sumner* v. *Mata*, 449 U. S. 539, 551 (1981).

Section 2254(d) is not, in the strict sense, a codification of our holding in *Townsend*. The listed circumstances in

Townsend are those in which a hearing must be held; the nearly identical listed circumstances in § 2254(d) are those in which facts found by a state court are not presumed correct. But the two are obviously intertwined. If a habeas petitioner fulfills one of the *Townsend* requirements he will be entitled to a hearing, and by virtue of fulfilling a *Townsend* requirement he will necessarily have also fulfilled one of the § 2254(d) requirements, so that at his hearing the presumption of correctness will not apply. On the other hand, if the petitioner has not fulfilled one of the *Townsend* requirements he will generally not have fulfilled the corresponding § 2254(d) requirement either, so he will be entitled neither to a hearing nor to an exception from the presumption of correctness. *Townsend* and § 2254(d) work hand in hand: Where a petitioner has a right to a hearing he must prove facts by a preponderance of the evidence, but where he has no right to a hearing he must prove facts by the higher standard of convincing evidence. Without the opportunity for a hearing, it is safe to assume that this higher standard will be unattainable for most petitioners. See L. Yackle, Postconviction Remedies 508–509 (1981).

In enacting a statute that so closely parallels *Townsend*, Congress established a procedural framework that relies upon *Townsend*'s continuing validity. In general, therefore, overruling *Townsend* would frustrate the evident intent of Congress that the question of when a hearing is to be held should be governed by the same standards as the question of when a federal court should defer to state court factfinding. In particular, the Court's adoption of a "cause and prejudice" standard for determining whether the material facts were adequately developed in state proceedings will frustrate Congress' intent with respect to that *Townsend* circumstance's statutory analog, § 2254(d)(3).

For a case to fit within this *Townsend* circumstance but none of *Townsend*'s other circumstances, the case will very likely be like this one, where the material facts were not

developed because of attorney error. Any other reason the material facts might not have been developed, such as that they were unknown at the time or that the State denied a full and fair opportunity to develop them, will almost certainly be covered by one of *Townsend*'s other circumstances. See *Townsend*, 372 U. S., at 313. We have already held that attorney error short of constitutionally ineffective assistance of counsel does not amount to "cause." See *Murray* v. *Carrier*, 477 U. S., at 488. As a result, the practical effect of the Court's ruling today will be that for a case to fall within *Townsend*'s fifth circumstance but no other—for a petitioner to be entitled to a hearing on the ground that the material facts were not adequately developed in state court but on no other ground—the petitioner's attorney must have rendered constitutionally ineffective assistance in presenting facts to the state factfinder.

This effect is more than a little ironic. Where the state factfinding occurs at the trial itself, counsel's ineffectiveness will not just entitle the petitioner to a hearing—it will entitle the petitioner to a new trial. Where, as in this case, the state factfinding occurs at a postconviction proceeding, the petitioner *has* no constitutional right to the effective assistance of counsel, so counsel's poor performance can *never* constitute "cause" under the cause and prejudice standard. *Coleman* v. *Thompson*, 501 U. S., at 752. After today's decision, the only petitioners entitled to a hearing under *Townsend*'s fifth circumstance are the very people who do not need one, because they will have already obtained a new trial or because they will already be entitled to a hearing under one of the other circumstances. The Court has thus rendered unusable the portion of *Townsend* requiring hearings where the material facts were not adequately developed in state court.

As noted above, the fact that § 2254(d)(3) uses language identical to the language we used in *Townsend* strongly suggests that Congress presumed the continued existence of this

portion of *Townsend*. Moreover, the Court's application of a cause and prejudice standard creates a conundrum regarding how to interpret § 2254(d)(3). If a cause and prejudice standard applies to § 2254(d)(3) as well as *Townsend*'s fifth circumstance, then the Court has rendered § 2254(d)(3) superfluous for the same reason this part of *Townsend* has become superfluous. While we may deprive portions of our own prior decisions of any effect, we generally may not, of course, do the same with portions of statutes. On the other hand, if a cause and prejudice standard does not apply to § 2254(d)(3), we will have uncoupled the statute from the case it was intended to follow, and there will likely be instances where a petitioner will be entitled to an exception from the presumption of correctness but will not be entitled to a hearing. This result does not accord with the evident intent of Congress that the first inquiry track the second. Reconciliation of these two questions is now left to the district courts, who still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory. See *Townsend*, *supra*, at 318.

For these reasons, I think § 2254(d) presumes the continuing validity of our decision in *Townsend*, including the portion of the decision that recognized a "deliberate bypass" exception to a petitioner's right to a hearing where the material facts were not adequately developed in the state court.

Jose Tamayo-Reyes alleges that he pleaded *nolo contendere* to a crime he did not understand. He has exhausted state remedies, has committed no procedural default, has properly presented his claim to a Federal District Court in his first petition for a writ of habeas corpus, and would be entitled to a hearing under the standard set forth in *Townsend*. Given that his claim is properly before the District Court, I would not cut off his right to prove his claim at a hearing. I respectfully dissent.

JUSTICE KENNEDY, dissenting.

By definition, the cases within the ambit of the Court's holding are confined to those in which the factual record developed in the state-court proceedings is inadequate to resolve the legal question. I should think those cases will be few in number. *Townsend* v. *Sain*, 372 U. S. 293, 318 (1963), has been the law for almost 30 years and there is no clear evidence that this particular classification of habeas proceedings has burdened the dockets of the federal courts. And in my view, the concept of factual inadequacy comprehends only those petitions with respect to which there is a realistic possibility that an evidentiary hearing will make a difference in the outcome. This serves to narrow the number of cases in a further respect and to ensure that they are the ones, as JUSTICE O'CONNOR points out, in which we have valid concerns with constitutional error.

Our recent decisions in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), *McCleskey* v. *Zant*, 499 U. S. 467 (1991), and *Teague* v. *Lane*, 489 U. S. 288 (1989), serve to protect the integrity of the writ, curbing its abuse and ensuring that the legal questions presented are ones which, if resolved against the State, can invalidate a final judgment. So we consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. We ought not to take steps which diminish the likelihood that those courts will base their legal decision on an accurate assessment of the facts. For these reasons and all those set forth by JUSTICE O'CONNOR, I dissent from the opinion and judgment of the Court.

Syllabus

DENTON, DIRECTOR OF CORRECTIONS OF CALIFORNIA, ET AL. *v.* HERNANDEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1846. Argued February 24, 1992—Decided May 4, 1992

Respondent Hernandez, a prisoner proceeding *pro se*, filed five civil rights suits *in forma pauperis* against petitioner California prison officials, alleging, *inter alia*, that he was drugged and homosexually raped 28 times by various inmates and prison officials at different institutions. Finding that the facts alleged appeared to be wholly fanciful, the District Court dismissed the cases under 28 U. S. C. § 1915(d), which allows courts to dismiss an *in forma pauperis* complaint "if satisfied that the action is frivolous." Reviewing the dismissals *de novo*, the Court of Appeals reversed and remanded three of the cases. The court's lead opinion concluded that a court can dismiss a complaint as factually frivolous only if the allegations conflict with judicially noticeable facts and that it was impossible to take judicial notice that none of the alleged rapes occurred; the concurring opinion concluded that Circuit precedent required that Hernandez be given notice that his claims were to be dismissed as frivolous and a chance to amend his complaints. The Court of Appeals adhered to these positions on remand from this Court for consideration of the Court's intervening decision in *Neitzke* v. *Williams*, 490 U. S. 319, which held that an *in forma pauperis* complaint "is frivolous [under § 1915(d)] where it lacks an arguable basis either in law or in fact," *id.*, at 325.

Held:

1. The Court of Appeals incorrectly limited the power granted the courts to dismiss a frivolous case under § 1915(d). Section 1915(d) gives the courts "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.*, at 327. Thus, the court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. However, in order to respect the congressional goal of assuring equality of consideration for all litigants, the initial assessment of the *in forma pauperis* plaintiff's factual allegations must be weighted in the plaintiff's favor. A factual frivolousness finding is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible,

whether or not there are judicially noticeable facts available to contradict them, but a complaint cannot be dismissed simply because the court finds the allegations to be improbable or unlikely. The "clearly baseless" guidepost need not be defined with more precision, since the district courts are in the best position to determine which cases fall into this category, and since the statute's instruction allowing dismissal if a court is "satisfied" that the complaint is frivolous indicates that the frivolousness decision is entrusted to the discretion of the court entertaining the complaint. Pp. 31–33.

2. Because the frivolousness determination is a discretionary one, a § 1915(d) dismissal is properly reviewed for an abuse of that discretion. It would be appropriate for a court of appeals to consider, among other things, whether the plaintiff was proceeding *pro se*, whether the district court inappropriately resolved genuine issues of disputed fact, whether the court applied erroneous legal conclusions, whether the court has provided a statement explaining the dismissal that facilitates intelligent appellate review, and whether the dismissal was with or without prejudice. With respect to the last factor, the reviewing court should determine whether the district court abused its discretion by dismissing the complaint with prejudice or without leave to amend if it appears that the allegations could be remedied through more specific pleading, since dismissal under § 1915(d) could have a res judicata effect on frivolousness determinations for future *in forma pauperis* petitions. This Court expresses no opinion on the Court of Appeals' rule that a *pro se* litigant bringing suit *in forma pauperis* is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. Pp. 33–35.

929 F. 2d 1374, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 35.

James Ching, Supervising Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren*, Attorney General, *George Williamson*, Chief Assistant Attorney General, *Kenneth C. Young*, Assistant Attorney General, and *Joan W. Cavanagh*, Supervising Deputy Attorney General.

Richard W. Nichols, by appointment of the Court, 502 U. S. 966, argued the cause and filed a brief for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

The federal *in forma pauperis* statute, codified at 28 U. S. C. § 1915, allows an indigent litigant to commence a civil or criminal action in federal court without paying the administrative costs of proceeding with the lawsuit. The statute protects against abuses of this privilege by allowing a district court to dismiss the case "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." § 1915(d). In *Neitzke* v. *Williams*, 490 U. S. 319 (1989), we considered the standard to be applied when determining whether the legal basis of an *in forma pauperis* complaint is frivolous under § 1915(d). The issues in this case are the appropriate inquiry for determining when an *in forma pauperis* litigant's factual allegations justify a § 1915(d) dismissal for frivolousness, and the proper standard of appellate review of such a dismissal.

I

Petitioners are 15 officials at various institutions in the California penal system. Between 1983 and 1985, respondent Mike Hernandez, a state prisoner proceeding *pro se*, named petitioners as defendants in five civil rights suits filed *in forma pauperis*. In relevant part, the complaints in these five suits allege that Hernandez was drugged and homosexually raped a total of 28 times by inmates and prison

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**Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Roberts* filed a brief for the United States as *amicus curiae* urging reversal.

Elizabeth Alexander, *David C. Fathi*, *John A. Powell*, *Steven R. Shapiro*, and *Matthew Coles* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

officials at different institutions.* With few exceptions, the alleged perpetrators are not identified in the complaints, because Hernandez does not claim any direct recollection of the incidents. Rather, he asserts that he found needle marks on different parts of his body, and fecal and semen stains on his clothes, which led him to believe that he had been drugged and raped while he slept.

Hernandez's allegations that he was sexually assaulted on the nights of January 13, 1984, and January 27, 1984, are supported by an affidavit signed by fellow prisoner Armando Esquer (Esquer Affidavit), which states:

> "On January 13, 1984, at approximately 7:30 a.m., I was on my way to the shower, when I saw correctional officer McIntyre, the P-2 Unit Officer, unlock inmate Mike Hernandez's cell door and subsequently saw as two black inmates stepped inside his cell. I did not see Officer McIntyre order these two black inmates out of inmate Mike Hernandez's cell after they stepped inside, even though inmate Mike Hernandez was asleep inside. After about ten minutes, I returned from the shower, and I noticed my friend, Mike Hernandez, was being sexually assaulted by the two black inmates. Officer McIn-

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*See Amended Complaint in *Hernandez* v. *Ylst*, et al., No. CIV S–83–0645 (Feb. 9, 1984) (alleging rape by unidentified correctional officers at California State Prison at Folsom on the night of July 29, 1982), Brief for Respondent 2–4; Motion to Amend Complaint in *Hernandez* v. *Denton*, et al., No. CIV S–83–1348 (June 19, 1984) (alleging rape by one or more prisoners at California Medical Facility at Vacaville on the night of July 29, 1983, and one additional episode in December 1983), Brief for Respondent 5; Complaint in *Hernandez* v. *Ylst*, et al., No. CIV S–84–1074 (Aug. 20, 1984) (alleging six additional druggings and rapes occurring between August 12 and November 4, 1983), Brief for Respondent 6; Complaint in *Hernandez* v. *Ylst*, et al., No. CIV S–84–1198 (Sept. 17, 1984) (alleging three additional incidents occurring between November 26 and December 12, 1983), Brief for Respondent 6–7; Complaint in *Hernandez* v. *Ylst*, et al., No. CIV S–85–0084 (Jan. 21, 1985) (alleging 16 additional incidents occurring between January 13 and December 10, 1984), Brief for Respondent 7.

> tyre returned to lock inmate Mike Hernandez's cell door after the two black inmates stepped out. I watch[ed] all this activity from the hallway and my cell door.
>
> "On January 27th, 1984, I was again on my way to the shower, when I noticed the same correctional officer as he unlocked inmate Mike Hernandez's cell door, and also saw as two black inmates stepped inside inmate Mike Hernandez's cell. Then I knew right away that both they and Officer McIntyre were up to no good. After this last incident, I became convinced that Officer McIntyre was deliberately unlocking my friend, Mike Hernandez's cell as he [lay] asleep, so that these two black inmates could sexually assault him in his cell." Exhibit H in No. CIV S–85–0084, Brief for Respondent 9.

Hernandez also attempted to amend one complaint to include an affidavit signed by fellow inmate Harold Pierce, alleging that on the night of July 29, 1983, he "witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he lay . . . asleep in bed 206 in the N-2 Unit Dorm." See Exhibit G to Motion to Amend Complaint in *Hernandez* v. *Denton*, et al., No. CIV S–83–1348 (June 19, 1984), Brief for Respondent 6.

The District Court determined that the five cases were related and referred them to a Magistrate, who recommended that the complaints be dismissed as frivolous. The Magistrate reasoned that "'each complaint, taken separately, is not necessarily frivolous,'" but that "'a different picture emerges from a reading of all five complaints together.'" *Id.*, at 11. As he explained: "'[Hernandez] alleges that both guards and inmates, at different institutions, subjected him to sexual assaults. Despite the fact that different defendants are allegedly responsible for each assault, the purported *modus operandi* is identical in every case. Moreover, the attacks occurred only sporadically throughout a three year period. The facts thus appear to be "wholly fanciful" and justify this court's dismissal of the actions as frivolous.'"

Ibid. By order dated May 5, 1986, the District Court adopted the recommendation of the Magistrate and dismissed the complaints.

Hernandez appealed the dismissal of three of the five cases (Nos. CIV S–83–0645, CIV S–83–1348, CIV S–85–0084; see n. 1, *supra*). Reviewing the dismissal *de novo*, the Court of Appeals for the Ninth Circuit reversed and remanded. *Hernandez* v. *Denton*, 861 F. 2d 1421 (1988). In relevant part, Judge Schroeder's lead opinion concluded that a district court could dismiss a complaint as factually frivolous only if the allegations conflicted with judicially noticeable facts, that is, facts "'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.*, at 1426 (quoting Fed. Rule Evid. 201). In this case, Judge Schroeder wrote, the court could not dismiss Hernandez's claims as frivolous because it was impossible to take judicial notice that none of the alleged rapes occurred. 861 F. 2d, at 1426. Judge Wallace concurred on the ground that Circuit precedent required that Hernandez be given notice that his claims were to be dismissed as frivolous and a chance to amend his complaints to remedy the deficiencies. *Id.*, at 1427. Judge Aldisert dissented. He was of the opinion that the allegations were "the hallucinations of a troubled man," *id.*, at 1440, and that no further amendment could save the complaint, *id.*, at 1439–1440.

We granted petitioners' first petition for a writ of certiorari, 493 U. S. 801 (1989), vacated the judgment, and remanded the case to the Court of Appeals for consideration of our intervening decision in *Neitzke* v. *Williams*, 490 U. S. 319 (1989). On remand, the Court of Appeals reaffirmed its earlier decision. 929 F. 2d 1374 (1991). Judge Schroeder modified her original opinion to state that judicial notice was just "one useful standard" for determining factual frivolousness under § 1915(d), but adhered to her position that the case could not be dismissed because no judicially noticeable fact could contradict Hernandez's claims of rape. *Id.*, at

1376. Judge Wallace and Judge Aldisert repeated their earlier views.

We granted the second petition for a writ of certiorari to consider when an *in forma pauperis* claim may be dismissed as factually frivolous under § 1915(d). 502 U. S. 937 (1991). We hold that the Court of Appeals incorrectly limited the power granted the courts to dismiss a frivolous case under § 1915(d), and therefore vacate and remand the case for application of the proper standard.

II

In enacting the federal *in forma pauperis* statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes it impossible . . . to pay or secure the costs" of litigation. *Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 342 (1948) (internal quotation marks omitted). At the same time that it sought to lower judicial access barriers to the indigent, however, Congress recognized that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." *Neitzke*, *supra*, at 324. In response to this concern, Congress included subsection (d) as part of the statute, which allows the courts to dismiss an *in forma pauperis* complaint "if satisfied that the action is frivolous or malicious."

Neitzke v. *Williams*, *supra*, provided us with our first occasion to construe the meaning of "frivolous" under § 1915(d). In that case, we held that "a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." *Id.*, at 325. In *Neitzke*, we were concerned with the proper standard for determining frivolousness of legal conclusions, and we determined that a complaint filed *in forma pauperis*

which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) may nonetheless have "an arguable basis in law" precluding dismissal under § 1915(d). 490 U. S., at 328–329. In so holding, we observed that the *in forma pauperis* statute, unlike Rule 12(b)(6), "accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Id.*, at 327. "Examples of the latter class," we said, "are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." *Id.*, at 328.

Petitioners contend that the decision below is inconsistent with the "unusual" dismissal power we recognized in *Neitzke*, and we agree. Contrary to the Ninth Circuit's assumption, our statement in *Neitzke* that § 1915(d) gives courts the authority to "pierce the veil of the complaint's factual allegations" means that a court is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. We therefore reject the notion that a court must accept as "having an arguable basis in fact," *id.*, at 325, all allegations that cannot be rebutted by judicially noticeable facts. At the same time, in order to respect the congressional goal of "assur[ing] equality of consideration for all litigants," *Coppedge* v. *United States*, 369 U. S. 438, 447 (1962), this initial assessment of the *in forma pauperis* plaintiff's factual allegations must be weighted in favor of the plaintiff. In other words, the § 1915(d) frivolousness determination, frequently made *sua sponte* before the defendant has even been asked to file an answer, cannot serve as a factfinding process for the resolution of disputed facts.

As we stated in *Neitzke*, a court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," 490 U. S., at 327, a category encompassing allegations

that are "fanciful," *id.*, at 325, "fantastic," *id.*, at 328, and "delusional," *ibid.* As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. An *in forma pauperis* complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely. Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be "strange, but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan, canto XIV, stanza 101 (T. Steffan, E. Steffan, & W. Pratt eds. 1977).

Although Hernandez urges that we define the "clearly baseless" guidepost with more precision, we are confident that the district courts, who are "all too familiar" with factually frivolous claims, *Neitzke, supra,* at 328, are in the best position to determine which cases fall into this category. Indeed, the statute's instruction that an action may be dismissed if the court is "satisfied" that it is frivolous indicates that frivolousness is a decision entrusted to the discretion of the court entertaining the *in forma pauperis* petition. We therefore decline the invitation to reduce the "clearly baseless" inquiry to a monolithic standard.

Because the frivolousness determination is a discretionary one, we further hold that a § 1915(d) dismissal is properly reviewed for an abuse of that discretion, and that it was error for the Court of Appeals to review the dismissal of Hernandez's claims *de novo.* Cf. *Boag* v. *MacDougall,* 454 U. S. 364, 365, n. (1982) *(per curiam)* (reversing dismissal of an *in forma pauperis* petition when dismissal was based on an erroneous legal conclusion and not exercise of the "broad discretion" granted by § 1915(d)); *Coppedge, supra,* at 446 (district court's certification that *in forma pauperis* appellant is taking appeal in good faith, as required by § 1915(a),

is "entitled to weight"). In reviewing a § 1915(d) dismissal for abuse of discretion, it would be appropriate for the Court of Appeals to consider, among other things, whether the plaintiff was proceeding *pro se*, see *Haines* v. *Kerner*, 404 U. S. 519, 520–521 (1972); whether the court inappropriately resolved genuine issues of disputed fact, see *supra*, at 32–33; whether the court applied erroneous legal conclusions, see *Boag*, 454 U. S., at 365, n.; whether the court has provided a statement explaining the dismissal that facilitates "intelligent appellate review," *ibid.*; and whether the dismissal was with or without prejudice.

With respect to this last factor: Because a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the *in forma pauperis* statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations. It could, however, have a res judicata effect on frivolousness determinations for future *in forma pauperis* petitions. See, *e. g.*, *Bryant* v. *Civiletti*, 214 U. S. App. D. C. 109, 110–111, 663 F. 2d 286, 287–288, n. 1 (1981) (§ 1915(d) dismissal for frivolousness is res judicata); *Warren* v. *McCall*, 709 F. 2d 1183, 1186, and n. 7 (CA7 1983) (same); cf. *Rogers* v. *Bruntrager*, 841 F. 2d 853, 855 (CA8 1988) (noting that application of res judicata principles after § 1915(d) dismissal can be "somewhat problematical"). Therefore, if it appears that frivolous factual allegations could be remedied through more specific pleading, a court of appeals reviewing a § 1915(d) disposition should consider whether the district court abused its discretion by dismissing the complaint with prejudice or without leave to amend. Because it is not properly before us, we express no opinion on the Ninth Circuit rule, applied below, that a *pro se* litigant bringing suit *in forma pauperis* is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect. *E. g.*, *Potter* v. *McCall*, 433 F. 2d 1087, 1088 (1970); *Noll* v. *Carlson*, 809 F. 2d 1446 (1987).

Accordingly, we vacate the judgment below and remand the case for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

My disagreement with the Court is narrow. I agree with its articulation of the standard to be applied in determining whether an *in forma pauperis* complaint is frivolous under 28 U. S. C. § 1915(d). Moreover, precedent supports the Court's decision to remand the case without expressing any view on the proper application of that standard to the facts of the case. See, *e. g.*, *Rufo* v. *Inmates of Suffolk County Jail*, 502 U. S. 367 (1992). Nevertheless, because I am satisfied that the decision of the Court of Appeals is entirely consistent with the standard announced today, I would affirm its judgment.

Syllabus

UNITED STATES *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 90–1972. Argued January 22, 1992—Decided May 4, 1992

Respondent Williams was indicted by a federal grand jury for alleged violations of 18 U. S. C. § 1014. On his motion, the District Court ordered the indictment dismissed without prejudice because the Government had failed to fulfill its obligation under Circuit precedent to present "substantial exculpatory evidence" to the grand jury. Following that precedent, the Court of Appeals affirmed.

Held:

1. The argument that the petition should be dismissed as improvidently granted because the question presented was not raised below was considered and rejected when this Court granted certiorari and is rejected again here. The Court will not review a question that was *neither* pressed *nor* passed on below, see, *e. g.*, *Stevens* v. *Department of Treasury*, 500 U. S. 1, 8, but there is no doubt that the Court of Appeals passed on the crucial issue of the prosecutor's duty to present exculpatory evidence to the grand jury. It is appropriate to review an important issue expressly decided by a federal court where, as here, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent. Pp. 40–45.

2. A district court may not dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession. Pp. 45–55.

(a) Imposition of the Court of Appeals' disclosure rule is not supported by the courts' inherent "supervisory power" to formulate procedural rules not specifically required by the Constitution or the Congress. This Court's cases relying upon that power deal strictly with the courts' control over their *own* procedures, whereas the grand jury is an institution separate from the courts, over whose functioning the courts do not preside. Any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is very limited and certainly would not permit the reshaping of the grand jury institution that would be the consequence of the proposed rule here. Pp. 45–50.

(b) The Court of Appeals' rule would neither preserve nor enhance the traditional functioning of the grand jury that the "common law" of

the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory body that sits to assess whether there is adequate basis for bringing a criminal charge into an adjudicatory body that sits to determine guilt or innocence. Because it has always been thought sufficient for the grand jury to hear only the prosecutor's side, and, consequently that the suspect has no right to present, and the grand jury no obligation to consider, exculpatory evidence, it would be incompatible with the traditional system to impose upon the prosecutor a legal obligation to present such evidence. Moreover, motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury have never been allowed, and it would make little sense to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. Pp. 51–55.

(c) This Court need not pursue respondent's argument that the Court of Appeals' rule would save valuable judicial time. If there is any advantage to the proposal, Congress is free to prescribe it. P. 55.

899 F. 2d 898, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, and in Parts II and III of which THOMAS, J., joined, *post*, p. 55.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Mueller, Deputy Solicitor General Bryson,* and *Michael R. Dreeben.*

James C. Lang argued the cause for respondent. With him on the brief were *G. Steven Stidham, Joel L. Wohlgemuth,* and *John E. Dowdell.**

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the

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**Dan Marmalefsky* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession.

I

On May 4, 1988, respondent John H. Williams, Jr., a Tulsa, Oklahoma, investor, was indicted by a federal grand jury on seven counts of "knowingly mak[ing] [a] false statement or report . . . for the purpose of influencing . . . the action [of a federally insured financial institution]," in violation of 18 U. S. C. § 1014 (1988 ed., Supp. II). According to the indictment, between September 1984 and November 1985 Williams supplied four Oklahoma banks with "materially false" statements that variously overstated the value of his current assets and interest income in order to influence the banks' actions on his loan requests.

Williams' misrepresentation was allegedly effected through two financial statements provided to the banks, a "Market Value Balance Sheet" and a "Statement of Projected Income and Expense." The former included as "current assets" approximately $6 million in notes receivable from three venture capital companies. Though it contained a disclaimer that these assets were carried at cost rather than at market value, the Government asserted that listing them as "current assets"—*i. e.*, assets quickly reducible to cash—was misleading, since Williams knew that none of the venture capital companies could afford to satisfy the notes in the short term. The second document—the Statement of Projected Income and Expense—allegedly misrepresented Williams' interest income, since it failed to reflect that the interest payments received on the notes of the venture capital companies were funded entirely by Williams' own loans to those companies. The Statement thus falsely implied, according to the Government, that Williams was deriving interest income from "an independent outside source." Brief for United States 3.

Shortly after arraignment, the District Court granted Williams' motion for disclosure of all exculpatory portions of the grand jury transcripts. See *Brady* v. *Maryland*, 373 U. S. 83 (1963). Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation under the Tenth Circuit's prior decision in *United States* v. *Page*, 808 F. 2d 723, 728 (1987), to present "substantial exculpatory evidence" to the grand jury (emphasis omitted). His contention was that evidence which the Government had chosen not to present to the grand jury—in particular, Williams' general ledgers and tax returns, and Williams' testimony in his contemporaneous Chapter 11 bankruptcy proceeding—disclosed that, for tax purposes and otherwise, he had regularly accounted for the "notes receivable" (and the interest on them) in a manner consistent with the Balance Sheet and the Income Statement. This, he contended, belied an intent to mislead the banks, and thus directly negated an essential element of the charged offense.

The District Court initially denied Williams' motion, but upon reconsideration ordered the indictment dismissed without prejudice. It found, after a hearing, that the withheld evidence was "relevant to an essential element of the crime charged," created "'a reasonable doubt about [respondent's] guilt,'" App. to Pet. for Cert. 23a–24a (quoting *United States* v. *Gray*, 502 F. Supp. 150, 152 (DC 1980)), and thus "render[ed] the grand jury's decision to indict gravely suspect," App. to Pet. for Cert. 26a. Upon the Government's appeal, the Court of Appeals affirmed the District Court's order, following its earlier decision in *Page*, *supra*. It first sustained as not "clearly erroneous" the District Court's determination that the Government had withheld "substantial exculpatory evidence" from the grand jury. See 899 F. 2d 898, 900–903 (CA10 1990). It then found that the Government's behavior "'substantially influence[d]'" the grand jury's decision to indict, or at the very least raised a "'grave doubt that the

decision to indict was free from such substantial influence.'" *Id.*, at 903 (quoting *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 263 (1988)); see 899 F. 2d, at 903–904. Under these circumstances, the Tenth Circuit concluded, it was not an abuse of discretion for the District Court to require the Government to begin anew before the grand jury.[1] We granted certiorari. 502 U. S. 905 (1991).

II

Before proceeding to the merits of this matter, it is necessary to discuss the propriety of reaching them. Certiorari was sought and granted in this case on the following question: "Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." The first point discussed in respondent's brief opposing the petition was captioned "The 'Question Presented' in the Petition Was Never Raised Below." Brief in Opposition 3. In granting certiorari, we necessarily considered and rejected that contention as a basis for denying review.

JUSTICE STEVENS' dissent, however, revisits that issue, and proposes that—after briefing, argument, and full consideration of the issue by all the Justices of this Court—we now decline to entertain this petition for the same reason we originally rejected, and that we dismiss it as improvidently granted. That would be improvident indeed. Our grant of certiorari was entirely in accord with our traditional practice, though even if it were not it would be imprudent (since there is no doubt that we have jurisdiction to entertain the case) to reverse course at this late stage. See, *e. g.*, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 560 (1957) (Harlan, J., concurring in part and dissenting in part); *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 648 (1974) (Stew-

[1] The Tenth Circuit also rejected Williams' cross-appeal, which contended that the District Court's dismissal should have been with prejudice. See 899 F. 2d, at 904.

art, J., concurring, joined by WHITE, J.). Cf. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985).

Our traditional rule, as the dissent correctly notes, precludes a grant of certiorari only when "the question presented was not pressed or passed upon below." *Post*, at 58 (internal quotation marks omitted). That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions. As recently as last Term, in fact (in an opinion joined by JUSTICE STEVENS), we entertained review in circumstances far more suggestive of the petitioner's "sleeping on its rights" than those we face today. We responded as follows to the argument of the Solicitor General that tracks today's dissent:

> "The Solicitor General . . . submits that the petition for certiorari should be dismissed as having been improvidently granted. He rests this submission on the argument that petitioner did not properly present the merits of the timeliness issue to the Court of Appeals, and that this Court should not address that question for the first time. He made the same argument in his opposition to the petition for certiorari. We rejected that argument in granting certiorari and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented." *Stevens* v. *Department of Treasury*, 500 U. S. 1, 8 (1991) (BLACKMUN, J.) (citations omitted).

And in another case decided last Term, we said the following:

> "Respondents argue that this issue was not raised below. The appeals court, however, addressed the availability of a right of action to minority shareholders in respondents' circumstances and concluded that respondents were entitled to sue. It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a

> state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1099, n. 8 (1991) (citations omitted; internal quotation marks omitted).

(JUSTICE STEVENS' separate concurrence and dissent in *Virginia Bankshares* also reached the merits. *Id.*, at 1110–1112.)[2] As JUSTICE O'CONNOR has written:

> "The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below. Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its

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[2]The dissent purports to distinguish *Stevens* and *Virginia Bankshares* on the ground that, "[a]lthough the parties may not have raised the questions presented in the petitions . . . before the Courts of Appeals in those cases, the courts treated the questions as open questions that they needed to resolve in order to decide the cases." *Post*, at 58, n. 4. The significance of this distinction completely eludes us. While there is much to be said for a rule (to which the Court has never adhered) limiting review to questions pressed by the litigants below, the rule implicitly proposed by the dissent—under which issues not pressed, but nevertheless passed upon, may be reviewed only if the court below thought the issue an "open" one—makes no sense except as a device to distinguish *Stevens* and *Virginia Bankshares*. It does nothing to further "the adversary process" that is the object of the dissent's concern, *post*, at 59, n. 5; if a question is not disputed by the parties, "the adversary process" is compromised whether the court thinks the question open or not. Indeed, if anything, it is compromised *more* when the lower court believes it is confronting a question of first impression, for it is in those circumstances that the need for an adversary presentation is most acute.

The dissent observes that where a court disposes of a case on the basis of a "new rule that had not been debated by the parties, our review may be appropriate to give the losing party an opportunity it would not otherwise have to challenge the rule." *Ibid.* That is true enough, but the suggestion that this principle has something to do with *Stevens* and *Virginia Bankshares* is wholly unfounded: In neither case could—or did—the losing party claim to have been ambushed by the lower court's summary treatment of the undisputed issues which we later subjected to plenary review.

> appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari . . . ." *Springfield* v. *Kibbe*, 480 U. S. 257, 266 (1987) (dissenting opinion) (emphasis in original; citations omitted).[3]

There is no doubt in the present case that the Tenth Circuit decided the crucial issue of the prosecutor's duty to present exculpatory evidence.[4] Moreover, this is not, as the dissent paints it, a case in which, "[a]fter losing in the Court of Appeals, the Government reversed its position," *post*, at 57.

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[3] The Court's *per curiam* dismissal of the writ in *Kibbe* was based principally upon two considerations: (1) that the crucial issue was not raised in the District Court because of failure to object to a jury instruction, thus invoking Rule 51 of the Federal Rules of Civil Procedure, which provides that "[n]o party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict," and (2) that the crucial issue had in addition not explicitly been raised in the petition for certiorari. 480 U. S., at 259, 260. Of course, neither circumstance exists here.

[4] Relying upon, and to some extent repeating, the reasoning of its earlier holding in *United States* v. *Page*, 808 F. 2d 723 (1981), the Court of Appeals said the following:

"We have previously held that a prosecutor has the duty to present substantial exculpatory evidence to the grand jury. Although we do not require the prosecutor to 'ferret out and present every bit of potentially exculpatory evidence,' we do require that substantial exculpatory evidence discovered during the course of an investigation be revealed to the grand jury. Other courts have also recognized that such a duty exists. This requirement promotes judicial economy because 'if a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury.'" 899 F. 2d 898, 900 (1990) (citations omitted).

This excerpt from the opinion below should make abundantly clear that, contrary to the dissent's mystifying assertion, see *post*, at 58, and n. 3, we premise our grant of certiorari not upon the Tenth Circuit's having "passed on" the issue in its prior *Page* decision, but rather upon its having done so in this case. We discuss *Page* only to point out that, had the Government *not* disputed the creation of the binding Tenth Circuit precedent in that case, a different exercise of discretion might be appropriate.

The dissent describes the Government as having "expressly acknowledged [in the Court of Appeals] *the responsibilities described in Page*," *post*, at 56 (emphasis added). It did no such thing. Rather, the Government acknowledged "*that it has certain responsibilities under . . . Page.*" Brief for United States in Response to Appellee's Brief in Nos. 88–2827, 88–2843 (CA10), p. 9 (emphasis added). It conceded, in other words, not that the responsibilities *Page* had imposed were proper, but merely that *Page* had imposed them—over the protests of the Government, but in a judgment that was nonetheless binding precedent for the panel below. The dissent would apparently impose, as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established in a case to which the party itself was privy and over the party's vigorous objection, see *Page*, 808 F. 2d, at 727 ("The government counters that a prosecutor has no duty to disclose exculpatory evidence [to a grand jury]"), and even though no "intervening developments in the law," *post*, at 59, n. 5, had occurred. That seems to us unreasonable.

In short, having reconsidered the precise question we resolved when this petition for review was granted, we again answer it the same way. It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court[5] where, although the peti-

[5] Where certiorari is sought to a state court, "due regard for the appropriate relationship of this Court to state courts," *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434–435 (1940), may suggest greater restraint in applying our "pressed or passed upon" rule. In that context, the absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground. See *Illinois* v. *Gates*, 462 U. S. 213, 222 (1983), cited by the dissent *post*, at 59; see also *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 79–80 (1988). But cf. *Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 667 (1991) ("It is irrelevant to this Court's juris-

tioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent. Undoubtedly the United States benefits from this rule more often than other parties; but that is inevitably true of most desirable rules of procedure or jurisdiction that we announce, the United States being the most frequent litigant in our courts. Since we announce the rule to be applicable to all parties; since we have recently applied a similar rule (indeed, a rule even more broadly cast) to the *disadvantage* of the United States, see *Stevens* v. *Department of Treasury*, 500 U. S. 1 (1991); and since the dissenters themselves have approved the application of this rule (or a broader one) in circumstances rationally indistinguishable from those before us, see n. 2, *supra;* the dissent's suggestion that in deciding this case "the Court appears to favor the Government over the ordinary litigant," *post*, at 59, and compromises its "obligation to administer justice impartially," *ibid.*, needs no response.

III

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," *United States* v. *Hasting*, 461 U. S. 499, 505 (1983), he argues that imposition of the Tenth Circuit's disclosure rule is supported by the courts' "supervisory power." We think not. *Hasting*, and the cases that rely upon the principle it expresses, deal strictly with the courts' power to control their *own* procedures. See, *e. g.*, *Jencks* v. *United States*, 353 U. S. 657, 667–

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diction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided").

668 (1957); *McNabb* v. *United States*, 318 U. S. 332 (1943). That power has been applied not only to improve the truth-finding process of the trial, see, *e. g.*, *Mesarosh* v. *United States*, 352 U. S. 1, 9–14 (1956), but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself, see, *e. g.*, *Weeks* v. *United States*, 232 U. S. 383 (1914). Thus, *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States* v. *Mechanik*, 475 U. S. 66, 74 (1986) (O'CONNOR, J., concurring in judgment).[6]

We did not hold in *Bank of Nova Scotia*, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled stand-

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[6] Rule 6 of the Federal Rules of Criminal Procedure contains a number of such rules, providing, for example, that "no person other than the jurors may be present while the grand jury is deliberating or voting," Rule 6(d), and placing strict controls on disclosure of "matters occurring before the grand jury," Rule 6(e); see generally *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418 (1983). Additional standards of behavior for prosecutors (and others) are set forth in the United States Code. See 18 U. S. C. §§ 6002, 6003 (setting forth procedures for granting a witness immunity from prosecution); § 1623 (criminalizing false declarations before grand jury); § 2515 (prohibiting grand jury use of unlawfully intercepted wire or oral communications); § 1622 (criminalizing subornation of perjury). That some of the misconduct alleged in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), was not specifically proscribed by Rule, statute, or the Constitution does not make the case stand for a judicially prescribable grand jury code, as the dissent suggests, see *post*, at 64–65. All of the allegations of violation were dismissed by the Court—without considering their validity in law—for failure to meet *Nova Scotia*'s dismissal standard. See *Bank of Nova Scotia*, *supra*, at 261.

ards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance—just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves. It is this latter exercise that respondent demands. Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such "supervisory" judicial authority exists, and that the disclosure rule applied here exceeded the Tenth Circuit's authority.

A

"[R]ooted in long centuries of Anglo-American history," *Hannah* v. *Larche*, 363 U. S. 420, 490 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "'is a constitutional fixture in its own right.'" *United States* v. *Chanen*, 549 F. 2d 1306, 1312 (CA9) (quoting *Nixon* v. *Sirica*, 159 U. S. App. D. C. 58, 70, n. 54, 487 F. 2d 700, 712, n. 54 (1973)), cert. denied, 434 U. S. 825 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See *Stirone* v. *United States*, 361 U. S. 212, 218 (1960); *Hale* v. *Henkel*, 201 U. S. 43, 61 (1906); G. Edwards, The Grand Jury 28–32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States* v. *Calandra*, 414 U. S. 338, 343 (1974); Fed. Rule Crim. Proc. 6(a).

The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised. "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.'" *United States* v. *R. Enterprises, Inc.*, 498 U. S. 292, 297 (1991) (quoting *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair* v. *United States*, 250 U. S. 273, 282 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation, see *Hale*, *supra*, at 59–60, 65, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. See *Calandra*, *supra*, at 343. It swears in its own witnesses, Fed. Rule Crim. Proc. 6(c), and deliberates in total secrecy, see *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424–425 (1983).

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. See, *e. g.*, *Brown* v. *United States*, 359 U. S. 41, 49 (1959). And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, see, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606 (1972) (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial privileges recognized by the common law, see *In re Grand Jury Investigation of Hugle*, 754 F. 2d 863 (CA9 1985) (opinion of Kennedy, J.) (same with respect to privilege for confidential marital communications). Even in this setting, however, we have insisted that the grand jury remain "free to pursue its investi-

gations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States* v. *Dionisio*, 410 U. S. 1, 17–18 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge*'. . . ." *Id.*, at 16 (emphasis added) (quoting *Stirone*, *supra*, at 218).

No doubt in view of the grand jury proceeding's status as other than a constituent element of a "criminal prosecutio[n]," U. S. Const., Amdt. 6, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. See *Ex parte United States*, 287 U. S. 241, 250–251 (1932); *United States* v. *Thompson*, 251 U. S. 407, 413–415 (1920). We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. See *United States* v. *Mandujano*, 425 U. S. 564, 581 (1976) (plurality opinion); *In re Groban*, 352 U. S. 330, 333 (1957); see also Fed. Rule Crim. Proc. 6(d). And although "the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee" against self-incrimination, *Calandra*, *supra*, at 346 (citing *Kastigar* v. *United States*, 406 U. S. 441 (1972)), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination "is nevertheless valid." *Calandra*, *supra*, at 346; see *Lawn* v. *United States*, 355 U. S. 339, 348–350 (1958); *United States* v. *Blue*, 384 U. S. 251, 255, n. 3 (1966).

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we

have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *United States* v. *Calandra*, *supra*, a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of "the potential injury to the historic role and functions of the grand jury." 414 U. S., at 349. In *Costello* v. *United States*, 350 U. S. 359 (1956), we declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.*, at 364.

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. See *United States* v. *Chanen*, 549 F. 2d, at 1313. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself. Cf., *e. g.*, *United States* v. *Payner*, 447 U. S. 727, 736 (1980) (supervisory power may not be applied to permit defendant to invoke third party's Fourth Amendment rights); see generally Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1490–1494, 1522 (1984). As we proceed to discuss, that would be the consequence of the proposed rule here.

B

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment "common law," a necessary means of assuring the constitutional right to the judgment "of an independent and informed grand jury," *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). Brief for Respondent 27. Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, *i. e.*, bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution. See, *e. g.*, *Stirone* v. *United States*, 361 U. S., at 218, n. 3. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See *United States* v. *Calandra*, 414 U. S., at 343. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); see also 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function not "to enquire . . . upon what foundation [the charge

may be] denied," or otherwise to try the suspect's defenses, but only to examine "upon what foundation [the charge] is made" by the prosecutor. *Respublica* v. *Shaffer*, 1 Dall. 236 (O. T. Phila. 1788); see also F. Wharton, Criminal Pleading and Practice § 360, pp. 248–249 (8th ed. 1880). As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented. See 2 Hale, *supra*, at 157; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 605–606 (CA2), cert. denied, 323 U. S. 790 (1944).

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury—unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure.[7] See, *e. g.*, *United States* v. *Law Firm of Zimmerman & Schwartz, P. C.*, 738 F. Supp. 407, 411 (Colo. 1990) (duty to disclose exculpatory evidence held satisfied when

[7] How much of a gamble that is is illustrated by the Court of Appeals' opinion in the present case. Though the court purported to be applying the "substantial exculpatory" standard set forth in its prior *Page* decision, see 899 F. 2d, at 900, portions of the opinion recite a much more inclusive standard. See *id.*, at 902 ("[T]he grand jury must receive any information that is relevant to any reasonable [exculpatory] theory it may adopt"); *ibid.* ("We conclude, therefore, that the district court was not clearly in error when it found that the deposition testimony was exculpatory").

prosecution tendered to the grand jury defense-provided exhibits, testimony, and explanations of the governing law), aff'd *sub nom. United States* v. *Brown*, 943 F. 2d 1246, 1257 (CA10 1991).

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury itself* chooses to hear no more evidence than that which suffices to convince it an indictment is proper. Cf. *Thompson*, *supra*, at 607. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." Brief for Respondent 27. We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." *United States* v. *Thompson*, 251 U. S., at 414. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

There is yet another respect in which respondent's proposal not only fails to comport with, but positively contradicts, the "common law" of the Fifth Amendment grand jury. Motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England, see, *e. g.*, *People* v. *Restenblatt*, 1 Abb. Pr. 268, 269 (Ct. Gen. Sess. N. Y. 1855). And the traditional American practice was described by Justice Nelson, riding circuit in 1852, as follows:

> "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint . . . ." *United States* v. *Reed*, 27 F. Cas. 727, 738 (No. 16,134) (CC NDNY 1852).

We accepted Justice Nelson's description in *Costello* v. *United States*, where we held that "[i]t would run counter to the whole history of the grand jury institution" to permit an indictment to be challenged "on the ground that there was inadequate or incompetent evidence before the grand jury." 350 U. S., at 363–364. And we reaffirmed this principle recently in *Bank of Nova Scotia*, where we held that "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment," and that "a challenge to the reliability or competence of the evidence presented to the grand jury" will not be heard. 487 U. S., at 261. It would make little sense, we think, to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation. A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading."[8] Our words in *Costello* bear repeating: Review of facially

[8] In *Costello*, for example, instead of complaining about the grand jury's *reliance* upon hearsay evidence the petitioner could have complained about the prosecutor's *introduction* of it. See, *e. g.*, *United States* v. *Estepa*, 471 F. 2d 1132, 1136–1137 (CA2 1972) (prosecutor should not introduce hearsay evidence before grand jury when direct evidence is available); see also Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463, 540 (1980) ("[S]ome federal courts have cautiously begun to . . . us[e] a revitalized prosecutorial misconduct doctrine to circumvent *Costello*'s prohibition against directly evaluating the sufficiency of the evidence presented to the grand jury").

valid indictments on such grounds "would run counter to the whole history of the grand jury institution[,] [and] [n]either justice nor the concept of a fair trial requires [it]." 350 U. S., at 364.

* * *

Echoing the reasoning of the Tenth Circuit in *United States* v. *Page*, 808 F. 2d, at 728, respondent argues that a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury would, by removing from the docket unjustified prosecutions, save valuable judicial time. That depends, we suppose, upon what the ratio would turn out to be between unjustified prosecutions eliminated and grand jury indictments challenged—for the latter as well as the former consume "valuable judicial time." We need not pursue the matter; if there is an advantage to the proposal, Congress is free to prescribe it. For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings. The judgment of the Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, and with whom JUSTICE THOMAS joins as to Parts II and III, dissenting.

The Court's opinion announces two important changes in the law. First, it justifies its special accommodation to the Solicitor General in granting certiorari to review a contention that was not advanced in either the District Court or the Court of Appeals by explaining that the fact that the issue was raised in a different case is an adequate substitute for raising it in *this* case. Second, it concludes that a federal court has no power to enforce the prosecutor's obligation to

protect the fundamental fairness of proceedings before the grand jury.

I

The question presented by the certiorari petition is whether the failure to disclose substantial exculpatory evidence to the grand jury is a species of prosecutorial misconduct that may be remedied by dismissing an indictment without prejudice. In the District Court and the Court of Appeals both parties agreed that the answer to that question is "yes, in an appropriate case." The only disagreement was whether this was an appropriate case: The prosecutor vigorously argued that it was not because the undisclosed evidence was not substantial exculpatory evidence, while respondent countered that the evidence was exculpatory and the prosecutor's misconduct warranted a dismissal with prejudice.

In an earlier case arising in the Tenth Circuit, *United States* v. *Page*, 808 F. 2d 723, cert. denied, 482 U. S. 918 (1987), the defendant had claimed that his indictment should have been dismissed because the prosecutor was guilty of misconduct during the grand jury proceedings. Specifically, he claimed that the prosecutor had allowed the grand jury to consider false testimony and had failed to present it with substantial exculpatory evidence. 808 F. 2d, at 726–727. After noting that there are "two views concerning the duty of a prosecutor to present exculpatory evidence to a grand jury," *id.*, at 727, the court concluded that the "better, and more balanced rule" is that "when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury," *id.*, at 728 (emphasis in original). The court declined to dismiss the indictment, however, because the evidence withheld in that case was not "clearly exculpatory." *Ibid.*

In this case the Government expressly acknowledged the responsibilities described in *Page*, but argued that the with-

held evidence was not exculpatory or significant.[1] Instead of questioning the controlling rule of law, it distinguished the facts of this case from those of an earlier case in which an indictment had been dismissed because the prosecutor had withheld testimony that made it factually impossible for the corporate defendant to have been guilty.[2] The Government concluded its principal brief with a request that the court apply the test set forth in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), "follow the holding of *Page*," and hold that dismissal was not warranted in this case because the withheld evidence was not substantial exculpatory evidence and respondent "was not prejudiced in any way." Brief for United States in No. 88–2827 (CA10), pp. 40–43.

After losing in the Court of Appeals, the Government reversed its position and asked this Court to grant certiorari

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[1] "The government has acknowledged that it has certain responsibilities under the case of *United States* v. *Page*, 808 F. 2d 723 (10th Cir. 1987), and that includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists. . . . The government would contend that . . . it was familiar with and complied with the principles stated in the case. . . . Considering the evidence as a whole, it is clear that the government complied with, and went beyond the requirements of *Page, supra*." Brief for United States in Response to Appellee's Brief in Nos. 88–2827, 88–2843 (CA10), pp. 9–10.

[2] Respondent had relied on *United States* v. *Phillips Petroleum Co.*, 435 F. Supp. 610 (ND Okla. 1977). The Government distinguished the case based on "the type of evidence excluded. In *Phillips, supra*, the prosecutor sent the Grand Jury home for the day, but continued questioning a witness. In that session, outside the hearing of the Grand Jury members, the witness, who had been granted use immunity, testified to certain information which showed that the witness had been the one who knowingly committed an offense, and showed that the corporation had not intentionally committed an offense in that case. There was no question that the withheld testimony made it factually impossible for the corporate defendant to have been guilty, and therefore the evidence was substantial and exculpatory. In the instant case there is a disagreement between the government and the defendant as to whether the documents the defendant wants presented in full are exculpatory." Brief for United States in No. 88–2827 (CA10), p. 38.

and to hold that the prosecutor has no judicially enforceable duty to present exculpatory evidence to the grand jury. In his brief in opposition to the petition, respondent clearly pointed out that the question presented by the petition "was neither presented to nor addressed by the courts below." Brief in Opposition 2. He appropriately called our attention to many of the cases in which we have stated, repeated, and reiterated the general rule that precludes a grant of certiorari when the question presented was "not pressed or passed upon below."[3] *Id.*, at 5–9. Apart from the fact that the United States is the petitioner, I see no reason for not following that salutary practice in this case.[4] Nevertheless, the requisite number of Justices saw fit to grant the Solicitor General's petition. 502 U. S. 905 (1991).

The Court explains that the settled rule does not apply to the Government's certiorari petition in this case because the Government raised the same question three years earlier in the *Page* case and the Court of Appeals passed on the issue in that case. *Ante*, at 44–45. This is a novel, and unwise,

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[3] *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); see also, *e. g.*, *United States* v. *Lovasco*, 431 U. S. 783, 788, n. 7 (1977); *United States* v. *Ortiz*, 422 U. S. 891, 898 (1975). Until today the Court has never suggested that the fact that an argument was pressed by the litigant or passed on by the court of appeals in a different case would satisfy this requirement.

[4] *Stevens* v. *Department of Treasury*, 500 U. S. 1 (1991), and *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083 (1991), discussed by the Court, *ante*, at 41–42, were routine applications of the settled rule. Although the parties may not have raised the questions presented in the petitions for certiorari before the Courts of Appeals in those cases, the courts treated the questions as open questions that they needed to resolve in order to decide the cases. Similarly, in *Springfield* v. *Kibbe*, 480 U. S. 257 (1987), the Court of Appeals had expressly considered and answered the question that JUSTICE O'CONNOR thought we should decide, see *id.*, at 263–266. This case, in contrast, involved "the routine restatement and application of settled law by an appellate court," which we have previously found insufficient to satisfy the "pressed or passed upon below" rule. *Illinois* v. *Gates*, 462 U. S. 213, 222–223 (1983).

change in the rule. We have never suggested that the fact that a court has repeated a settled proposition of law and applied it, without objection, in the case at hand provides a sufficient basis for our review.[5] See *Illinois* v. *Gates*, 462 U. S. 213, 222–223 (1983), and cases cited therein. If this is to be the rule in the future, it will either provide a basis for a significant expansion of our discretionary docket[6] or, if applied only to benefit repetitive litigants, a special privilege for the Federal Government.

This Court has a special obligation to administer justice impartially and to set an example of impartiality for other courts to emulate. When the Court appears to favor the Government over the ordinary litigant, it seriously compromises its ability to discharge that important duty. For that

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[5] The Court expresses an inability to understand the difference between the routine application, without objection, of a settled rule, on the one hand, and the decision of an open question on a ground not argued by the parties, on the other. The difference is best explained in light of the basic assumption that the adversary process provides the best method of arriving at correct decisions. Rules of appellate practice generally require that an issue be actually raised and debated by the parties if it is to be preserved. In the exceptional case, in which an appellate court announces a new rule that had not been debated by the parties, our review may be appropriate to give the losing party an opportunity it would not otherwise have to challenge the rule. In this case, however, there is no reason why the Government could not have challenged the *Page* rule in this case in the Tenth Circuit. There is no need for an exception to preserve the losing litigant's opportunity to be heard. Moreover, the Government's failure to object to the application of the *Page* rule deprived the Court of Appeals of an opportunity to reexamine the validity of that rule in the light of intervening developments in the law. "Sandbagging" is just as improper in an appellate court as in a trial court.

[6] The "expressed or passed on" predicate for the exercise of our jurisdiction is of special importance in determining our power to review state-court judgments. If the Court's newly announced view that the routine application of a settled rule satisfies the "passed on" requirement in a federal case, I see no reason why it should not also satisfy the same requirement in a state case.

reason alone, I would dismiss the writ of certiorari as improvidently granted.[7]

II

Like the Hydra slain by Hercules, prosecutorial misconduct has many heads. Some are cataloged in Justice Sutherland's classic opinion for the Court in *Berger* v. *United States*, 295 U. S. 78 (1935):

> "That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of

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[7] The Court suggests that it would be "improvident" for the Court to dismiss the writ of certiorari on the ground that the Government failed to raise the question presented in the lower courts because respondent raised this argument in his brief in opposition, the Court nevertheless granted the writ, and the case has been briefed and argued. *Ante*, at 40. I disagree. The vote of four Justices is sufficient to grant a petition for certiorari, but that action does not preclude a majority of the Court from dismissing the writ as improvidently granted after the case has been argued. See, *e. g.*, *NAACP* v. *Overstreet*, 384 U. S. 118 (1966) (dismissing, after oral argument, writ as improvidently granted over the dissent of four Justices). We have frequently dismissed the writ as improvidently granted after the case has been briefed and argued; in fact, we have already done so twice this Term. See *Gibson* v. *Florida Bar*, 502 U. S. 104 (1991); *PFZ Properties, Inc.* v. *Rodriguez*, 503 U. S. 257 (1992). Although we do not always explain the reason for the dismissal, we have on occasion dismissed the writ for the reasons raised by the respondent in the brief in opposition. Thus, nothing precludes the Court from dismissing the writ in this case.

> bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner. . . .
>
> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." *Id.*, at 84–85.

This, of course, is not an exhaustive list of the kinds of improper tactics that overzealous or misguided prosecutors have adopted in judicial proceedings. The reported cases of this Court alone contain examples of the knowing use of perjured testimony, *Mooney* v. *Holohan*, 294 U. S. 103 (1935), the suppression of evidence favorable to an accused person, *Brady* v. *Maryland*, 373 U. S. 83, 87–88 (1963), and misstatements of the law in argument to the jury, *Caldwell* v. *Mississippi*, 472 U. S. 320, 336 (1985), to name just a few.

Nor has prosecutorial misconduct been limited to judicial proceedings: The reported cases indicate that it has sometimes infected grand jury proceedings as well. The cases contain examples of prosecutors presenting perjured testimony, *United States* v. *Basurto*, 497 F. 2d 781, 786 (CA9 1974), questioning a witness outside the presence of the grand jury and then failing to inform the grand jury that the testimony was exculpatory, *United States* v. *Phillips Petroleum, Inc.*, 435 F. Supp. 610, 615–617 (ND Okla. 1977), failing to inform the grand jury of its authority to subpoena witnesses, *United States* v. *Samango*, 607 F. 2d 877, 884 (CA9 1979), operating under a conflict of interest, *United States* v. *Gold*, 470 F. Supp. 1336, 1346–1351 (ND Ill. 1979), misstating the law, *United States* v. *Roberts*, 481 F. Supp. 1385, 1389, and n. 10 (CD Cal. 1980),[8] and misstating the facts on cross-

[8]The court found the Government guilty of prosecutorial misconduct because it "fail[ed] to provide the polygraph evidence to the Grand Jury despite the prosecutor's guarantee to Judge Pregerson that all exculpatory evidence would be presented to the Grand Jury, and compound[ed] this indiscretion by erroneously but unequivocally telling the Grand Jury that

examination of a witness, *United States* v. *Lawson*, 502 F. Supp. 158, 162, and nn. 6–7 (Md. 1980).

Justice Sutherland's identification of the basic reason why that sort of misconduct is intolerable merits repetition:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U. S., at 88.

It is equally clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. As the Court of Appeals for the Third Circuit recognized, "the costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there

> "the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special

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the polygraph evidence was inadmissible." *United States* v. *Roberts*, 481 F. Supp., at 1389.

relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." *United States* v. *Serubo*, 604 F. 2d 807, 817 (1979).

In his dissent in *United States* v. *Ciambrone*, 601 F. 2d 616 (CA2 1979), Judge Friendly also recognized the prosecutor's special role in grand jury proceedings:

> "As the Supreme Court has noted, 'the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury."' *United States* v. *Calandra*, 414 U. S. 338, 343, . . . (1974). Before the grand jury the prosecutor has the dual role of pressing for an indictment and of being the grand jury adviser. In case of conflict, the latter duty must take precedence. *United States* v. *Remington*, 208 F. 2d 567, 573–74 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U. S. 913 . . . (1954).
>
> "The *ex parte* character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.'

Berger v. *United States*, 295 U. S. 78, 88 . . . (1935)." *Id.*, at 628–629.[9]

The standard for judging the consequences of prosecutorial misconduct during grand jury proceedings is essentially the same as the standard applicable to trials. In *United States* v. *Mechanik*, 475 U. S. 66 (1986), we held that there was "no reason not to apply [the harmless error rule] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself," *id.*, at 71–72. We repeated that holding in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250 (1988), when we rejected a defendant's argument that an indictment should be dismissed because of prosecutorial misconduct and irregularities in proceedings before the grand jury. Referring to the prosecutor's misconduct before the grand jury, we "concluded that our customary harmless-error inquiry is applicable where, as in the cases before us, a court is asked to dismiss an indictment prior to the conclusion of the trial." *Id.*, at 256. Moreover, in reviewing the instances of misconduct in that case, we applied precisely the

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[9] Although the majority in *Ciambrone* did not agree with Judge Friendly's appraisal of the prejudicial impact of the misconduct in that case, it also recognized the prosecutor's duty to avoid fundamentally unfair tactics during the grand jury proceedings. Judge Mansfield explained:

"On the other hand, the prosecutor's right to exercise some discretion and selectivity in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it. The prosecutor, for instance, may not obtain an indictment on the basis of evidence known to him to be perjurious, *United States* v. *Basurto*, 497 F. 2d 781, 785–86 (9th Cir. 1974), or by leading it to believe that it has received eyewitness rather than hearsay testimony, *United States* v. *Estepa*, 471 F. 2d 1132, 1136–37 (2d Cir. 1972). We would add that where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict. See ABA Project on Standards for Criminal Justice—the Prosecution Function, §3.6, pp. 90–91." 601 F. 2d, at 623.

same standard to the prosecutor's violations of Rule 6 of the Federal Rules of Criminal Procedure and to his violations of the general duty of fairness that applies to all judicial proceedings. This point is illustrated by the Court's comments on the prosecutor's abuse of a witness:

> "The District Court found that a prosecutor was abusive to an expert defense witness during a recess and in the hearing of some grand jurors. Although the Government concedes that the treatment of the expert tax witness was improper, the witness himself testified that his testimony was unaffected by this misconduct. The prosecutors instructed the grand jury to disregard anything they may have heard in conversations between a prosecutor and a witness, and explained to the grand jury that such conversations should have no influence on its deliberations. App. 191. In light of these ameliorative measures, there is nothing to indicate that the prosecutor's conduct toward this witness substantially affected the grand jury's evaluation of the testimony or its decision to indict." 487 U. S., at 261.

Unquestionably, the plain implication of that discussion is that if the misconduct, even though not expressly forbidden by any written rule, had played a critical role in persuading the jury to return the indictment, dismissal would have been required.

In an opinion that I find difficult to comprehend, the Court today repudiates the assumptions underlying these cases and seems to suggest that the court has no authority to supervise the conduct of the prosecutor in grand jury proceedings so long as he follows the dictates of the Constitution, applicable statutes, and Rule 6 of the Federal Rules of Criminal Procedure. The Court purports to support this conclusion by invoking the doctrine of separation of powers and citing a string of cases in which we have declined to impose categori-

cal restraints on the grand jury. Needless to say, the Court's reasoning is unpersuasive.

Although the grand jury has not been "textually assigned" to "any of the branches described in the first three Articles" of the Constitution, *ante*, at 47, it is not an autonomous body completely beyond the reach of the other branches. Throughout its life, from the moment it is convened until it is discharged, the grand jury is subject to the control of the court. As Judge Learned Hand recognized over 60 years ago, "a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter* v. *United States*, 23 F. 2d 420, 425 (CA2), cert. denied, 277 U. S. 590 (1928). This Court has similarly characterized the grand jury:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so." *Brown* v. *United States*, 359 U. S. 41, 49 (1959).

See also *Blair* v. *United States*, 250 U. S. 273, 280 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States"); *United States* v. *Calandra*, 414 U. S. 338, 346, and n. 4 (1974).

This Court has, of course, long recognized that the grand jury has wide latitude to investigate violations of federal law as it deems appropriate and need not obtain permission from either the court or the prosecutor. See, *e. g.*, *id.*, at 343; *Costello* v. *United States*, 350 U. S. 359, 362 (1956); *Hale* v. *Henkel*, 201 U. S. 43, 65 (1906). Correspondingly, we have acknowledged that "its operation generally is unrestrained

by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Calandra*, 414 U. S., at 343. But this is because Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; it is not because they lack all power to do so.[10]

To the contrary, the Court has recognized that it has the authority to create and enforce limited rules applicable in grand jury proceedings. Thus, for example, the Court has said that the grand jury "may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." *Id.*, at 346. And the Court may prevent a grand jury from violating such a privilege by quashing or modifying a subpoena, *id.*, at 346, n. 4, or issuing a protective order forbidding questions in violation of the privilege, *Gravel* v. *United States*, 408 U. S. 606, 628–629 (1972). Moreover, there are, as the Court notes, *ante*, at 49, a series of cases in which we declined to impose categorical restraints on the grand jury. In none of those cases, however, did we question our power to reach a contrary result.[11]

Although the Court recognizes that it may invoke its supervisory authority to fashion and enforce privilege rules applicable in grand jury proceedings, *ibid.*, and suggests that

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[10] Indeed, even the Court acknowledges that Congress has the power to regulate the grand jury, for it concedes that Congress "is free to prescribe" a rule requiring the prosecutor to disclose substantial exculpatory evidence to the grand jury. *Ante*, at 55.

[11] In *Costello* v. *United States*, 350 U. S. 359, 363 (1956), for example, the Court held that an indictment based solely on hearsay evidence is not invalid under the Grand Jury Clause of the Fifth Amendment. The Court then rejected the petitioner's argument that it should invoke "its power to supervise the administration of justice in federal courts" to create a rule permitting defendants to challenge indictments based on unreliable hearsay evidence. The Court declined to exercise its power in this way because "[n]o persuasive reasons are advanced for establishing such a rule. It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id.*, at 364.

it may also invoke its supervisory authority to fashion other limited rules of grand jury procedure, *ante*, at 48–49, it concludes that it has no authority to *prescribe* "standards of prosecutorial conduct before the grand jury," *ante*, at 46–47, because that would alter the grand jury's historic role as an independent, inquisitorial institution. I disagree.

We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a "protector of citizens against arbitrary and oppressive governmental action." *United States* v. *Calandra*, 414 U. S., at 343. Explaining why the grand jury must be both "independent" and "informed," the Court wrote in *Wood* v. *Georgia*, 370 U. S. 375 (1962):

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Id.*, at 390.

It blinks reality to say that the grand jury can adequately perform this important historic role if it is intentionally misled by the prosecutor—on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely.

Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable

in grand jury proceedings. Such a sharp break with the traditional role of the federal judiciary is unprecedented, unwarranted, and unwise. Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods.[12]

III

What, then, is the proper disposition of this case? I agree with the Government that the prosecutor is not required to place all exculpatory evidence before the grand jury. A grand jury proceeding is an *ex parte* investigatory proceeding to determine whether there is probable cause to believe a violation of the criminal laws has occurred, not a trial. Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation. But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary. I thus agree with the Department of Justice that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise dis-

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[12] Although the Court's opinion barely mentions the fact that the grand jury was intended to serve the invaluable function of standing between the accuser and the accused, I must assume that in a proper case it will acknowledge—as even the Solicitor General does—that unrestrained prosecutorial misconduct in grand jury proceedings "could so subvert the integrity of the grand jury process as to justify judicial intervention. Cf. *Franks* v. *Delaware*, 438 U. S. 154, 164–171 (1978) (discussing analogous considerations in holding that a search warrant affidavit may be challenged when supported by deliberately false police statements)." Brief for United States 22, n. 8.

close such evidence to the grand jury before seeking an indictment against such a person." U. S. Dept. of Justice, United States Attorneys' Manual ¶ 9–11.233, p. 88 (1988).

Although I question whether the evidence withheld in this case directly negates respondent's guilt,[13] I need not resolve my doubts because the Solicitor General did not ask the Court to review the nature of the evidence withheld. Instead, he asked us to decide the legal question whether an indictment may be dismissed because the prosecutor failed to present exculpatory evidence. Unlike the Court and the Solicitor General, I believe the answer to that question is yes, if the withheld evidence would plainly preclude a finding of probable cause. I therefore cannot endorse the Court's opinion.

More importantly, because I am so firmly opposed to the Court's favored treatment of the Government as a litigator, I would dismiss the writ of certiorari as improvidently granted.

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[13] I am reluctant to rely on the lower courts' judgment in this regard, as they apparently applied a more lenient legal standard. The District Court dismissed the indictment because the "information withheld raises reasonable doubt about the Defendant's intent to defraud," and thus "renders the grand jury's decision to indict gravely suspect." App. to Pet. for Cert. 26a. The Court of Appeals affirmed this decision because it was not "clearly erroneous." 899 F. 2d 898, 902–904 (CA10 1990).

Syllabus

FOUCHA *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 90–5844. Argued November 4, 1991—Decided May 18, 1992

Under Louisiana law, a criminal defendant found not guilty by reason of insanity may be committed to a psychiatric hospital. If a hospital review committee thereafter recommends that the acquittee be released, the trial court must hold a hearing to determine whether he is dangerous to himself or others. If he is found to be dangerous, he may be returned to the hospital whether or not he is then mentally ill. Pursuant to this statutory scheme, a state court ordered petitioner Foucha, an insanity acquittee, returned to the mental institution to which he had been committed, ruling that he was dangerous on the basis of, *inter alia*, a doctor's testimony that he had recovered from the drug induced psychosis from which he suffered upon commitment and was "in good shape" mentally; that he had, however, an antisocial personality, a condition that is not a mental disease and is untreatable; that he had been involved in several altercations at the institution; and that, accordingly, the doctor would not "feel comfortable in certifying that he would not be a danger to himself or to other people." The State Court of Appeal refused supervisory writs, and the State Supreme Court affirmed, holding, among other things, that *Jones* v. *United States*, 463 U. S. 354, did not require Foucha's release and that the Due Process Clause of the Fourteenth Amendment was not violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Held: The judgment is reversed.

563 So. 2d 1138, reversed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and II, concluding that the Louisiana statute violates the Due Process Clause because it allows an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness. Although *Jones*, *supra*, acknowledged that an insanity acquittee could be committed, the Court also held that, as a matter of due process, he is entitled to release when he has recovered his sanity or is no longer dangerous, *id.*, at 368, *i. e.*, he may be held as long as he is both mentally ill and dangerous, but no longer. Here, since the State does not contend that Foucha was mentally ill at the time of the

trial court's hearing, the basis for holding him in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. There are at least three difficulties with the State's attempt to perpetuate his confinement on the basis of his antisocial personality. First, even if his continued confinement were constitutionally permissible, keeping him against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. *Vitek* v. *Jones*, 445 U. S. 480, 492. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. See, *e. g.*, *Jones* v. *United States*, *supra*, at 368. Second, if he can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. *Jackson* v. *Indiana*, 406 U. S. 715. Third, the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Zinermon* v. *Burch*, 494 U. S. 113, 125. Although a State may imprison convicted criminals for the purposes of deterrence and retribution, Louisiana has no such interest here, since Foucha was not convicted and may not be punished. *Jones*, 463 U. S., at 369. Moreover, although the State may confine a person if it shows by clear and convincing evidence that he is mentally ill and dangerous, *id.*, at 362, Louisiana has not carried that burden here. Furthermore, *United States* v. *Salerno*, 481 U. S. 739—in which this Court held that in certain narrow circumstances pretrial detainees who pose a danger to others or the community may be subject to limited confinement—does not save the state statute. Unlike the sharply focused statutory scheme at issue in *Salerno*, the Louisiana scheme is not carefully limited. Pp. 75–85.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined, and an opinion with respect to Part III, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 86. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 90. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 102.

James P. Manasseh argued the cause for petitioner. With him on the briefs was *Martin E. Regan, Jr.*

Pamela S. Moran argued the cause for respondent. With her on the brief was *Harry F. Connick.**

JUSTICE WHITE delivered the opinion of the Court, except as to Part III.

When a defendant in a criminal case pending in Louisiana is found not guilty by reason of insanity, he is committed to a psychiatric hospital unless he proves that he is not dangerous. This is so whether or not he is then insane. After commitment, if the acquittee or the superintendent begins release proceedings, a review panel at the hospital makes a written report on the patient's mental condition and whether he can be released without danger to himself or others. If release is recommended, the court must hold a hearing to determine dangerousness; the acquittee has the burden of proving that he is not dangerous. If found to be dangerous, the acquittee may be returned to the mental institution whether or not he is then mentally ill. Petitioner contends that this scheme denies him due process and equal protection because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.

I

Petitioner Terry Foucha was charged by Louisiana authorities with aggravated burglary and illegal discharge of a firearm. Two medical doctors were appointed to conduct a pretrial examination of Foucha. The doctors initially reported, and the trial court initially found, that Foucha lacked mental capacity to proceed, App. 8–9, but four months later the trial court found Foucha competent to stand trial, *id.*, at 4–5. The doctors reported that Foucha was unable to distin-

*Briefs of *amici curiae* urging reversal were filed for the American Orthopsychiatric Association et al. by *James W. Ellis* and *Barbara E. Bergman;* and for the American Psychiatric Association by *Joel I. Klein.*

guish right from wrong and was insane at the time of the offense.[1] On October 12, 1984, the trial court ruled that Foucha was not guilty by reason of insanity, finding that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the above crimes and that he is presently insane." *Id.*, at 6. He was committed to the East Feliciana Forensic Facility until such time as doctors recommend that he be released, and until further order of the court. In 1988, the superintendent of Feliciana recommended that Foucha be discharged or released. A three-member panel was convened at the institution to determine Foucha's current condition and whether he could be released or placed on probation without being a danger to others or himself. On March 21, 1988, the panel reported that there had been no evidence of mental illness since admission and recommended that Foucha be conditionally discharged.[2] The trial judge appointed a two-member sanity commission made up of the same two doctors who had conducted the pretrial examination. Their written report stated that Foucha "is presently in remission from mental illness [but] [w]e cannot certify that he would not constitute

[1] Louisiana law provides: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." La. Rev. Stat. Ann. § 14:14 (West 1986). JUSTICE KENNEDY disregards the fact that the State makes no claim that Foucha was criminally responsible or that it is entitled to punish Foucha as a criminal.

[2] The panel unanimously recommended that petitioner be conditionally discharged with recommendations that he (1) be placed on probation; (2) remain free from intoxicating and mind-altering substances; (3) attend a substance abuse clinic on a regular basis; (4) submit to regular and random urine drug screening; and (5) be actively employed or seeking employment. App. 10–11.

Although the panel recited that it was charged with determining dangerousness, its report did not expressly make a finding in that regard.

a menace to himself or others if released." *Id.*, at 12. One of the doctors testified at a hearing that upon commitment Foucha probably suffered from a drug induced psychosis but that he had recovered from that temporary condition; that he evidenced no signs of psychosis or neurosis and was in "good shape" mentally; that he had, however, an antisocial personality, a condition that is not a mental disease and that is untreatable. The doctor also testified that Foucha had been involved in several altercations at Feliciana and that he, the doctor, would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people." *Id.*, at 18.

After it was stipulated that the other doctor, if he were present, would give essentially the same testimony, the court ruled that Foucha was dangerous to himself and others and ordered him returned to the mental institution. The Court of Appeal refused supervisory writs, and the State Supreme Court affirmed, holding that Foucha had not carried the burden placed upon him by statute to prove that he was not dangerous, that our decision in *Jones* v. *United States*, 463 U. S. 354 (1983), did not require Foucha's release, and that neither the Due Process Clause nor the Equal Protection Clause was violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari. 499 U. S. 946 (1991).

II

Addington v. *Texas*, 441 U. S. 418 (1979), held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his

own welfare and protection of others. Proof beyond a reasonable doubt was not required, but proof by preponderance of the evidence fell short of satisfying due process.[3]

When a person charged with having committed a crime is found not guilty by reason of insanity, however, a State may commit that person without satisfying the *Addington* burden with respect to mental illness and dangerousness. *Jones* v. *United States*, *supra*. Such a verdict, we observed in *Jones*, "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness," *id.*, at 363, an illness that the defendant adequately proved in this context by a preponderance of the evidence. From these two facts, it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed.[4]

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[3] JUSTICE THOMAS in dissent complains that Foucha should not be released based on psychiatric opinion that he is not mentally ill because such opinion is not sufficiently precise—because psychiatry is not an exact science and psychiatrists widely disagree on what constitutes a mental illness. That may be true, but such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the person is no longer mentally ill or dangerous. It is also reliable enough for the State not to punish a person who by a preponderance of the evidence is found to have been insane at the time he committed a criminal act, to say nothing of not trying a person who is at the time found incompetent to understand the proceedings. And more to the point, medical predictions of dangerousness seem to be reliable enough for JUSTICE THOMAS to permit the State to continue to hold Foucha in a mental institution, even where the psychiatrist would say no more than that he would hesitate to certify that Foucha would not be dangerous to himself or others.

[4] JUSTICE KENNEDY's assertion that we overrule the holding of *Jones* described in the above paragraph is fanciful at best. As that paragraph plainly shows, we do not question and fully accept that insanity acquittees may be initially held without complying with the procedures applicable to civil committees. As is evident from the ensuing paragraph of the text, we are also true to the further holding of *Jones* that both JUSTICE THOMAS

We held, however, that "[t]he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous," *id.*, at 368; *i. e.*, the acquittee may be held as long as he is both mentally ill and dangerous, but no longer. We relied on *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), which held as a matter of due process that it was unconstitutional for a State to continue to confine a harmless, mentally ill person. Even if the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed." *Id.*, at 575. In the summary of our holdings in our opinion we stated that "the Constitution permits the Government, on the basis of the insanity judg-

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and JUSTICE KENNEDY reject: that the period of time during which an insanity acquittee may be held in a mental institution is not measured by the length of a sentence that might have been imposed had he been convicted; rather, the acquittee may be held until he is either not mentally ill or not dangerous. Both Justices would permit the indefinite detention of the acquittee, although the State concedes that he is not mentally ill and although the doctors at the mental institution recommend his release, for no reason other than that a psychiatrist hesitates to certify that the acquittee would not be dangerous to himself or others.

JUSTICE KENNEDY asserts that we should not entertain the proposition that a verdict of not guilty by reason of insanity differs from a conviction. *Post*, at 94. *Jones*, however, involved a case where the accused had been "found, beyond a reasonable doubt, to have committed a criminal act." 463 U. S., at 364. We did not find this sufficient to negate any difference between a conviction and an insanity acquittal. Rather, we observed that a person convicted of crime may of course be punished. But "[d]ifferent considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished." *Id.*, at 369.

JUSTICE KENNEDY observes that proof beyond reasonable doubt of the commission of a criminal act permits a State to incarcerate and hold the offender on any reasonable basis. There is no doubt that the States have wide discretion in determining punishment for convicted offenders, but the Eighth Amendment ensures that discretion is not unlimited. The Justice cites no authority, but surely would have if it existed, for the proposition that a defendant convicted of a crime and sentenced to a term of years may nevertheless be held indefinitely because of the likelihood that he will commit other crimes.

ment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones*, 463 U. S., at 368, 370.[5] The court below was in error in characterizing the above language from *Jones* as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance. In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. *O'Connor*, *supra*, at 574–575.

The State, however, seeks to perpetuate Foucha's confinement at Feliciana on the basis of his antisocial personality which, as evidenced by his conduct at the facility, the court found rendered him a danger to himself or others. There are at least three difficulties with this position. First, even if his continued confinement were constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. In *Vitek* v. *Jones*, 445 U. S. 480 (1980), we held that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as men-

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[5] JUSTICE THOMAS, dissenting, suggests that there was no issue of the standards for release before us in *Jones*. The issue in that case, however, was whether an insanity acquittee "must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted," 463 U. S., at 356; and in the course of deciding that issue in the negative, we said that the detainee could be held until he was no longer mentally ill or no longer dangerous, regardless of how long a prison sentence might have been. We noted in footnote 11 that Jones had not sought a release based on nonillness or nondangerousness, but as indicated in the text, we twice announced the outside limits on the detention of insanity acquittees. The Justice would "wish" away this aspect of *Jones*, but that case merely reflected the essence of our prior decisions.

tally ill without appropriate procedures to prove that he was mentally ill. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." *Id.*, at 492. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. *Jones*, *supra*, at 368; *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972). Here, according to the testimony given at the hearing in the trial court, Foucha is not suffering from a mental disease or illness. If he is to be held, he should not be held as a mentally ill person. See *Jones*, *supra*, at 368; *Jackson*, *supra*, at 738. Cf. *United States* v. *Salerno*, 481 U. S. 739, 747–748 (1987); *Schall* v. *Martin*, 467 U. S. 253, 270 (1984).

Second, if Foucha can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. *Jackson* v. *Indiana*, *supra*, indicates as much. There, a person under criminal charges was found incompetent to stand trial and was committed until he regained his sanity. It was later determined that nothing could be done to cure the detainee, who was a deaf mute. The state courts refused to order his release. We reversed, holding that the State was entitled to hold a person for being incompetent to stand trial only long enough to determine if he could be cured and become competent. If he was to be held longer, the State was required to afford the protections constitutionally required in a civil commitment proceeding. We noted, relying on *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), that a convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the State committed him in a civil proceeding. "'[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.'" *Jackson* v. *Indiana*, *supra*, at 724, quoting *Baxstrom*, *supra*, at 111–112.

Third, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon* v. *Burch*, 494 U. S. 113, 125 (1990). See also *Salerno*, *supra*, at 746; *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986). Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Youngberg* v. *Romeo*, 457 U. S. 307, 316 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones*, *supra*, at 361 (internal quotation marks omitted). We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Salerno*, *supra*, at 750.

A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. See, *e. g.*, *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Robinson* v. *California*, 370 U. S. 660 (1962). Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. *Jones*, *supra*, at 369. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility as La. Rev. Stat. Ann. § 14:14 (West 1986) requires. See n. 1, *supra*.

The State may also confine a mentally ill person if it shows "by clear and convincing evidence that the individual is mentally ill and dangerous," *Jones*, 463 U. S., at 362. Here, the State has not carried that burden; indeed, the State does not claim that Foucha is now mentally ill.

We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement and it is on these cases, particularly *United States* v. *Salerno*, *supra*, that the State relies in this case.

Salerno, unlike this case, involved pretrial detention. We observed in *Salerno* that the "government's interest in preventing crime by arrestees is both legitimate and compelling," *id.*, at 749, and that the statute involved there was a constitutional implementation of that interest. The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes (crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses, or certain repeat offenders), *id.*, at 747, and was narrowly focused on a particularly acute problem in which the government interests are overwhelming, *id.*, at 750. In addition to first demonstrating probable cause, the Government was required, in a "full-blown adversary hearing," to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, *i. e.*, that the "arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 751. Furthermore, the duration of confinement under the Bail Reform Act of 1984 (Act) was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the "stringent time limitations of the Speedy Trial Act." *Id.*, at 747. If the arrestee were convicted, he would be confined as a criminal proved guilty; if he were acquitted, he would go free. Moreover, the Act required that detainees be housed, to the extent practicable, in a facility separate from persons awaiting or serving sentences or awaiting appeal. *Id.*, at 747–748.

Salerno does not save Louisiana's detention of insanity acquittees who are no longer mentally ill. Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued de-

tention, for the statute places the burden on the detainee to prove that he is not dangerous. At the hearing which ended with Foucha's recommittal, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. There was only a description of Foucha's behavior at Feliciana and his antisocial personality, along with a refusal to certify that he would not be dangerous. When directly asked whether Foucha would be dangerous, Dr. Ritter said only, "I don't think I would feel comfortable in certifying that he would not be a danger to himself or to other people." App. 18. This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility.

Furthermore, if Foucha committed criminal acts while at Feliciana, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.

It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. 481 U. S., at 747; see also *Schall*, 467 U. S., at 269. Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any con-

victed criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, *supra*, at 755. The narrowly focused pretrial detention of arrestees permitted by the Bail Reform Act was found to be one of those carefully limited exceptions permitted by the Due Process Clause. We decline to take a similar view of a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.[6]

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[6] JUSTICE THOMAS' dissent firmly embraces the view that the State may indefinitely hold an insanity acquittee who is found by a court to have been cured of his mental illness and who is unable to prove that he would not be dangerous. This would be so even though, as in this case, the court's finding of dangerousness is based solely on the detainee's antisocial personality that apparently has caused him to engage in altercations from time to time. JUSTICE THOMAS, however, does not challenge the holding of our cases that a convicted criminal may not be held as a mentally ill person without following the requirements for civil commitment, which would not permit further detention based on dangerousness alone. Yet it is surely strange to release sane but very likely dangerous persons who have committed a crime knowing precisely what they were doing but continue to hold indefinitely an insanity detainee who committed a criminal act at a time when, as found by a court, he did not know right from wrong. JUSTICE THOMAS' rationale for continuing to hold the insanity acquittee would surely justify treating the convicted felon in the same way, and if put to it, it appears that he would permit it. But as indicated in the text, this is not consistent with our present system of justice.

JUSTICE THOMAS relies heavily on the American Law Institute's (ALI) Model Penal Code and Commentary. However, his reliance on the Model Code is misplaced and his quotation from the Commentary is importantly incomplete. JUSTICE THOMAS argues that the Louisiana statute follows

III

It should be apparent from what has been said earlier in this opinion that the Louisiana statute also discriminates

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"the current provisions" of the Model Penal Code, but he fails to mention that § 4.08 is "current" only in the sense that the Model Code has not been amended since its approval in 1962, and therefore fails to incorporate or reflect substantial developments in the relevant decisional law during the intervening three decades. Thus, although this is nowhere noted in the dissent, the Explanatory Notes expressly concede that related and similarly "current" provisions of Article 4 are unconstitutional. See, *e. g.*, ALI, Model Penal Code § 4.06(2), Explanatory Note (1985) (noting that § 4.06(2), permitting indefinite commitment of a mentally incompetent defendant without the finding required for civil commitment, is unconstitutional in light of *Jackson* v. *Indiana*, 406 U. S. 715 (1972), and other decisions of this Court). Nor indeed does JUSTICE THOMAS advert to the 1985 Explanatory Note to § 4.08 itself, even though that note directly questions the constitutionality of the provision that he so heavily relies on; it acknowledges, as JUSTICE THOMAS does not, that "it is now questionable whether a state may use the single criterion of dangerousness to grant discharge if it employs a different standard for release of persons civilly committed." JUSTICE THOMAS also recites from the Commentary regarding § 4.08. However, the introductory passage that JUSTICE THOMAS quotes prefaces a more important passage that he omits. After explaining the rationale for the questionable provision, the Commentary states: "Constitutional doubts . . . exist about the criterion of dangerousness. If a person committed civilly must be released when he is no longer suffering mental illness, it is questionable whether a person acquitted on grounds of mental disease or defect excluding responsibility can be kept in custody solely on the ground that he continues to be dangerous." *Id.*, § 4.08, Comment 3, p. 260. Thus, while JUSTICE THOMAS argues that the Louisiana statute is not a relic of a bygone age, his principal support for this assertion is a 30-year-old provision of the Model Penal Code whose constitutionality has since been openly questioned by the ALI reporters themselves.

Similarly unpersuasive is JUSTICE THOMAS' claim regarding the number of States that allow confinement based on dangerousness alone. First, this assertion carries with it an obvious but unacknowledged corollary—the vast majority of States do not allow confinement based on dangerousness alone. Second, JUSTICE THOMAS' description of these state statutes also is importantly incomplete. Even as he argues that a scheme of confinement based on dangerousness alone is not a relic of a bygone age, JUSTICE THOMAS neglects to mention that two of the statutes he relies

against Foucha in violation of the Equal Protection Clause of the Fourteenth Amendment. *Jones* established that insanity acquittees may be treated differently in some respects from those persons subject to civil commitment, but Foucha, who is not now thought to be insane, can no longer be so classified. The State nonetheless insists on holding him indefinitely because he at one time committed a criminal act and does not now prove he is not dangerous. Louisiana law, however, does not provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious and large category of such persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release.

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on have been amended, as JUSTICE O'CONNOR notes. Nor does JUSTICE THOMAS acknowledge that at least two of the other statutes he lists as permitting confinement based on dangerousness alone have been given a contrary construction by highest state courts, which have found that the interpretation for which JUSTICE THOMAS cites them would be impermissible. See *State* v. *Fields*, 77 N. J. 282, 390 A. 2d 574 (1978); *In re Lewis*, 403 A. 2d 1115, 1121 (Del. 1979), quoting *Mills* v. *State*, 256 A. 2d 752, 757, n. 4 (Del. 1969) ("By necessary implication, the danger referred to must be construed to relate to mental illness for the reason that dangerousness without mental illness could not be a valid basis for indeterminate confinement in the State hospital"). See also ALI, Model Penal Code, *supra*, at 260 (although provisions may on their face allow for confinement based on dangerousness alone, in virtually all actual cases the questions of dangerousness and continued mental disease are likely to be closely linked). As the widespread rejection of the standard for confinement that JUSTICE THOMAS and JUSTICE KENNEDY argue for demonstrates, States are able to protect both the safety of the public and the rights of the accused without challenging foundational principles of American criminal justice and constitutional law.

Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.

Furthermore, in civil commitment proceedings the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence. *Addington*, 441 U. S., at 425–433. Similarly, the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists. See *Jackson*, 406 U. S., at 724; *Baxstrom*, 383 U. S., at 111–112. Cf. *Humphrey* v. *Cady*, 405 U. S. 504, 510–511 (1972). However, the State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of proving even this ground for confinement by clear and convincing evidence. The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court.

For the foregoing reasons the judgment of the Louisiana Supreme Court is reversed.

So ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

Louisiana asserts that it may indefinitely confine Terry Foucha in a mental facility because, although not mentally ill, he might be dangerous to himself or to others if released. For the reasons given in Part II of the Court's opinion, this contention should be rejected. I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits in-

definite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill.

I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health. Under Louisiana law, defendants who carry the burden of proving insanity by a preponderance of the evidence will "escape punishment," but this affirmative defense becomes relevant only after the prosecution establishes beyond a reasonable doubt that the defendant committed criminal acts with the required level of criminal intent. *State* v. *Marmillion*, 339 So. 2d 788, 796 (La. 1976). Although insanity acquittees may not be incarcerated as criminals or penalized for asserting the insanity defense, see *Jones* v. *United States*, 463 U. S. 354, 368–369, and n. 18 (1983), this finding of criminal conduct sets them apart from ordinary citizens.

We noted in *Jones* that a judicial determination of criminal conduct provides "concrete evidence" of dangerousness. *Id.*, at 364. By contrast, "'[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .'" *Id.*, at 365, n. 13 (quoting *Greenwood* v. *United States*, 350 U. S. 366, 375 (1956)). Given this uncertainty, "courts should pay particular deference to reasonable legislative judgments" about the relationship between dangerous behavior and mental illness. *Jones*, *supra*, at 365, n. 13. Louisiana evidently has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a clinical finding of sanity, and that judgment merits judicial deference.

It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention

were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness. See *United States* v. *Salerno*, 481 U. S. 739, 747–751 (1987); *Schall* v. *Martin*, 467 U. S. 253, 264–271 (1984); *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972). Although the dissenters apparently disagree, see *post*, at 100 (opinion of KENNEDY, J.); *post*, at 125 (opinion of THOMAS, J.), I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent. See *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980) (discussing infringements upon liberty unique to commitment to a mental hospital); *Jones*, *supra*, at 384–385 (Brennan, J., dissenting) (same). Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a nonviolent or relatively minor crime. Cf. *Salerno*, *supra*, at 750 (interest in pretrial detention is "overwhelming" where only individuals arrested for "a specific category of extremely serious offenses" are detained and "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest"). Equal protection principles may set additional limits on the confinement of sane but dangerous acquittees. Although I think it unnecessary to reach equal protection issues on the facts before us, the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question.

The second point to be made about the Court's holding is that it places no new restriction on the States' freedom to determine whether, and to what extent, mental illness should excuse criminal behavior. The Court does not indi-

cate that States must make the insanity defense available. See Idaho Code § 18–207(a) (1987) (mental condition not a defense to criminal charges); Mont. Code Ann. § 46–14–102 (1991) (evidence of mental illness admissible to prove absence of state of mind that is an element of the offense). It likewise casts no doubt on laws providing for prison terms after verdicts of "guilty but mentally ill." See, *e. g.*, Del. Code Ann., Tit. 11, § 408(b) (1987); Ill. Rev. Stat., ch. 38, ¶ 1005–2–6 (1989); Ind. Code § 35–36–2–5 (Supp. 1991). If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment.

Finally, it should be noted that the great majority of States have adopted policies consistent with the Court's holding. JUSTICE THOMAS claims that 11 States have laws comparable to Louisiana's, see *post*, at 112–113, n. 9, but even this number overstates the case. Two of the States JUSTICE THOMAS mentions have already amended their laws to provide for the release of acquittees who do not suffer from mental illness but may be dangerous. See Cal. Penal Code Ann. § 1026.2 (West Supp. 1992) (effective Jan. 1, 1994); Va. Code Ann. § 19.2–182.5 (Supp. 1991) (effective July 1, 1992). Three others limit the maximum duration of criminal commitment to reflect the acquittee's specific crimes and hold acquittees in facilities appropriate to their mental condition. See N. J. Stat. Ann. §§ 2C:4–8(b)(3) (West 1982), 30:4–24.2 (West 1981); Wash. Rev. Code §§ 10.77.020(3), 10.77.110(1) (1990); Wis. Stat. §§ 971.17(1), (3)(c) (Supp. 1991). I do not understand the Court's opinion to render such laws necessarily invalid.

Of the remaining six States, two do not condition commitment upon proof of every element of a crime. Kan. Stat. Ann. § 22–3428(1) (Supp. 1990) ("A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the offense charged . . . , except that the person did not possess the requisite

criminal intent"); Mont. Code Ann. § 46–14–301(1) (1991) (allowing commitment of persons "found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged"). Such laws might well fail even under the dissenters' theories. See *post*, at 91–94 (KENNEDY, J., dissenting); *post*, at 103 (THOMAS, J., dissenting).

Today's holding follows directly from our precedents and leaves the States appropriate latitude to care for insanity acquittees in a way consistent with public welfare. Accordingly, I concur in Parts I and II of the Court's opinion and in the judgment of the Court.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution. I agree with the Court's reaffirmation of this first premise. But I submit with all respect that the majority errs in its failure to recognize that the conditions for incarceration imposed by the State in this case are in accord with legitimate and traditional state interests, vindicated after full and fair procedures. The error results from the majority's primary reliance on cases, such as *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and *Addington* v. *Texas*, 441 U. S. 418 (1979), which define the due process limits for involuntary civil commitment. The majority relies on these civil cases while overruling without mention one of the holdings of our most recent and significant precedent from the criminal context, *Jones* v. *United States*, 463 U. S. 354 (1983).

This is a criminal case. It began one day when petitioner, brandishing a .357 revolver, entered the home of a married couple, intending to steal. Brief for Respondent 1. He

chased them out of their home and fired on police officers who confronted him as he fled. *Id.*, at 1–2. Petitioner was apprehended and charged with aggravated burglary and the illegal use of a weapon in violation of La. Rev. Stat. Ann. §§ 14:60 and 14:94 (West 1986). 563 So. 2d 1138, 1138–1139 (La. 1990). There is no question that petitioner committed the criminal acts charged. Petitioner's response was to deny criminal responsibility based on his mental illness when he committed the acts. He contended his mental illness prevented him from distinguishing between right and wrong with regard to the conduct in question.

Mental illness may bear upon criminal responsibility, as a general rule, in either of two ways: First, it may preclude the formation of *mens rea*, if the disturbance is so profound that it prevents the defendant from forming the requisite intent as defined by state law; second, it may support an affirmative plea of legal insanity. See W. LaFave & A. Scott, Jr., 1 Substantive Criminal Law § 4.1(b), pp. 429–430 (1986) (hereinafter LaFave & Scott). Depending on the content of state law, the first possibility may implicate the State's initial burden, under *In re Winship*, 397 U. S. 358, 364 (1970), to prove every element of the offense beyond a reasonable doubt, while the second possibility does not. *Patterson* v. *New York*, 432 U. S. 197, 206 (1977); *Leland* v. *Oregon*, 343 U. S. 790, 795–796 (1952).

The power of the States to determine the existence of criminal insanity following the establishment of the underlying offense is well established. In *Leland* v. *Oregon*, we upheld a state law that required the defendant to prove insanity beyond a reasonable doubt, observing that this burden had no effect on the State's initial burden to prove every element of the underlying criminal offense.

> "[T]he burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, ac-

> cording to the instructions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty. The jurors were to consider separately the issue of legal sanity *per se*—an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict." *Id.*, at 795–796 (footnotes omitted).

As then-JUSTICE REHNQUIST explained the reasoning of *Leland*, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." *Mullaney* v. *Wilbur*, 421 U. S. 684, 706 (1975) (concurring opinion); see also *Patterson* v. *New York*, *supra*, at 206 (defense of insanity considered only after the facts constituting the crime have been proved beyond a reasonable doubt); *Rivera* v. *Delaware*, 429 U. S. 877 (1976) (dismissing challenge to a *Leland* instruction for want of a substantial federal question).

Louisiana law follows the pattern in *Leland* with clarity and precision. Pursuant to La. Code Crim. Proc. Ann., Art. 552 (West 1981), the petitioner entered a dual plea of not guilty and not guilty by reason of insanity. The dual plea, which the majority does not discuss or even mention, ensures that the *Winship* burden remains on the State to prove all the elements of the crime. The Louisiana Supreme Court confirms this in a recent case approving the following jury instruction on the defense of insanity:

> "'In this case the accused has entered a dual plea of not guilty and not guilty by reason of insanity. As a consequence of such a plea, you must first determine whether or not the accused committed a crime [on which you have been instructed]. If you are convinced beyond a reasonable doubt that the accused did commit any of these crimes, any one of these crimes, then you must proceed to a determination of whether he was sane at the time the crime was committed and thereby crimi-

nally responsible for committing it.'" *State* v. *Marmillion*, 339 So. 2d 788, 796 (1976).

The State's burden is unaffected by an adjudication without trial, such as occurred here, because state law requires the trial court to determine, before accepting the plea, that there is a factual basis for it. La. Code Crim. Proc. Ann., Art. 558.1 (West Supp. 1992). There is no dispute that the trial court complied with state law and made the requisite findings.

Compliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law. *Addington*, 441 U. S., at 428. Its effect is at once both symbolic and practical, as a statement of values about respect and confidence in the criminal law, *Winship*, 397 U. S., at 364, and an apportionment of risk in favor of the accused, *id.*, at 369–372 (Harlan, J., concurring). We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard. See, *e. g.*, *United States* v. *Salerno*, 481 U. S. 739, 750–751 (1987); *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972); cf. *Jones* v. *United States*, 463 U. S., at 363–364, and n. 12 ("The proof beyond a reasonable doubt that the acquittee committed a criminal act distinguishes this case from *Jackson* v. *Indiana*, 406 U. S. 715 (1972) . . . . In *Jackson* there never was any affirmative proof that the accused had committed criminal acts . . ."). The same heightened due process scrutiny does not obtain, though, once the State has met its burden of proof and obtained an adjudication. It is well settled that upon compliance with *In re Winship*, the State may incarcerate on any reasonable basis. *Chapman* v. *United States*, 500 U. S. 453, 465 (1991); *Williams* v. *Illinois*, 399 U. S. 235, 243 (1970).

As JUSTICE THOMAS observes in his dissent, the majority errs by attaching "talismanic significance" to the fact that petitioner has been adjudicated "not guilty by reason of in-

sanity." *Post*, at 118, n. 13. A verdict of not guilty by reason of insanity is neither equivalent nor comparable to a verdict of not guilty standing alone. We would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant has the burden of proof. Nor should we entertain the proposition that this case differs from a conviction of guilty because petitioner has been adjudged "not guilty by reason of insanity," rather than "guilty but insane." Petitioner has suggested no grounds on which to distinguish the liberty interests involved or procedural protections afforded as a consequence of the State's ultimate choice of nomenclature. The due process implications ought not to vary under these circumstances. This is a criminal case in which the State has complied with the rigorous demands of *In re Winship*.

The majority's failure to recognize the criminal character of these proceedings and its concomitant standards of proof leads it to conflate the standards for civil and criminal commitment in a manner not permitted by our precedents. *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), and *Addington* v. *Texas*, *supra*, define the due process limits of involuntary civil commitment. Together they stand for the proposition that in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence. See *O'Connor*, *supra*, at 575; *Addington*, *supra*, at 433. Their precedential value in the civil context is beyond question. But it is an error to apply these precedents, as the majority does today, to criminal proceedings. By treating this criminal case as a civil one, the majority overrules a principal holding in *Jones* v. *United States*, 463 U. S., at 354.

In *Jones* we considered the system of criminal commitment enacted by Congress for the District of Columbia. *Id.*, at 356–358. Congress provided for acquittal by reason of insanity only after the Government had shown, beyond a rea-

sonable doubt, that the defendant had committed the crimes charged. *Id.*, at 363–364, and n. 12. In cases of acquittal by reason of insanity, District law provided for automatic commitment followed by periodic hearings, where the insanity acquittee was given the opportunity to prove that he was no longer insane or dangerous. *Id.*, at 357–358, and n. 3. Petitioner in *Jones* contended that *Addington* and *O'Connor* applied to criminal proceedings as well as civil, requiring the Government to prove insanity and dangerousness by clear and convincing evidence before commitment. We rejected that contention. In *Jones* we distinguished criminal from civil commitment, holding that the Due Process Clause permits automatic incarceration after a criminal adjudication and without further process. *Id.*, at 366. The majority today in effect overrules that holding. It holds that "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." *Ante*, at 78; see also *ante*, at 80, 85–86. Our holding in *Jones* was clear and to the contrary. We should not so disregard controlling precedent.

Our respect for the Court's opinion in *Jones* should be informed by the recognition that its distinction between civil and criminal commitment is both sound and consistent with long-established precedent. First, as described above, the procedural protections afforded in a criminal commitment surpass those in a civil commitment; indeed, these procedural protections are the most stringent known to our law. Second, proof of criminal conduct in accordance with *In re Winship* eliminates the risk of incarceration "for mere 'idiosyncratic behavior,' [because a] criminal act by definition is not 'within a range of conduct that is generally acceptable.'" *Jones*, *supra*, at 367, quoting *Addington*, *supra*, at 426–427. The criminal law defines a discrete category of conduct for which society has reserved its greatest opprobrium and strictest sanctions; past or future dangerousness, as ascer-

tained or predicted in civil proceedings, is different in kind. Third, the State presents distinct rationales for these differing forms of commitment: In the civil context, the State acts in large part on the basis of its *parens patriae* power to protect and provide for an ill individual, while in the criminal context, the State acts to ensure the public safety. See *Addington*, 441 U. S., at 426; S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 24–25 (3d ed. 1985). A dismissive footnote, see *ante*, at 76–77, n. 4, cannot overcome these fundamental defects in the majority's opinion.

The majority's opinion is troubling at a further level, because it fails to recognize or account for profound differences between clinical insanity and state-law definitions of criminal insanity. It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science. "[T]he divergence between law and psychiatry is caused in part by the legal fiction represented by the words 'insanity' or 'insane,' which are a kind of lawyer's catchall and have no clinical meaning." J. Biggs, The Guilty Mind 117 (1955); see also 2 J. Bouvier, Law Dictionary 1590 (8th ed. 1914) ("The legal and the medical ideas of insanity are essentially different, and the difference is one of substance"). Consistent with the general rule that the definition of both crimes and defenses is a matter of state law, see *Patterson* v. *New York*, 432 U. S., at 210, the States are free to recognize and define the insanity defense as they see fit.

> "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers." *Powell* v. *Texas*, 392 U. S. 514, 536–537 (1968) (plurality opinion).

See also *id.*, at 545 (the Constitution does not impose on the States any particular test of criminal responsibility) (Black, J., concurring).

As provided by Louisiana law, and consistent with both federal criminal law and the law of a majority of the States, petitioner was found not guilty by reason of insanity under the traditional *M'Naghten* test. See La. Rev. Stat. Ann. § 14:14 (West 1986); 18 U. S. C. § 17; *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843); 1 LaFave & Scott § 4.2, at 436. Louisiana law provides a traditional statement of this test: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." La. Rev. Stat. Ann. § 14:14 (West 1986).

Because the *M'Naghten* test for insanity turns on a finding of criminal irresponsibility at the time of the offense, it is quite wrong to place reliance on the fact, as the majority does, that Louisiana does not contend that petitioner is now insane. See *ante*, at 78. This circumstance should come as no surprise, since petitioner was competent at the time of his plea, 563 So. 2d, at 1139, and indeed could not have entered a plea otherwise, see *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975). Present sanity would have relevance if petitioner had been committed as a consequence of civil proceedings, in which dangerous conduct in the past was used to predict similar conduct in the future. It has no relevance here, however. Petitioner has not been confined based on predictions about future behavior but rather for past criminal conduct. Unlike civil commitment proceedings, which attempt to divine the future from the past, in a criminal trial whose outcome turns on *M'Naghten*, findings of past insanity and past criminal conduct possess intrinsic and ultimate significance.

The system here described is not employed in all jurisdictions. Some have supplemented the traditional *M'Naghten* test with the so-called "irresistible impulse" test, see 1 LaFave & Scott § 4.1, at 427–428; others have adopted a test proposed as part of the Model Penal Code, see *ibid.*; and still

others have abolished the defense altogether, see Idaho Code § 18–207(a) (1987); Mont. Code Ann. § 46–14–102 (1992). Since it is well accepted that the States may define their own crimes and defenses, see *supra*, at 96, the point would not warrant further mention, but for the fact that the majority loses sight of it. In describing our decision in *Jones*, the majority relies on our statement that a verdict of not guilty by reason of insanity establishes that the defendant "'committed the act because of mental illness.'" *Ante*, at 76, quoting *Jones*, 463 U. S., at 363. That was an accurate statement in *Jones* but not here. The defendant in *Jones* was acquitted under the *Durham* test for insanity, which excludes from punishment criminal conduct that is the product of a mental disease or defect. See *Bethea* v. *United States*, 365 A. 2d 64, 69, n. 11 (1976); see also *Durham* v. *United States*, 94 U. S. App. D. C. 228, 240–241, 214 F. 2d 862, 874–875 (1954). In a *Durham* jurisdiction, it would be fair to say, as the Court did in *Jones*, that a defendant acquitted by reason of insanity "committed the act because of mental illness." *Jones*, *supra*, at 363. The same cannot be said here, where insanity under *M'Naghten* proves only that the defendant could not have distinguished between right and wrong. It is no small irony that the aspect of *Jones* on which the majority places greatest reliance, and indeed cites as an example of its adherence to *Jones*, has no bearing on the Louisiana statute at issue here. See *ante*, at 76, and n. 4.

The establishment of a criminal act and of insanity under the *M'Naghten* regime provides a legitimate basis for confinement. Although Louisiana has chosen not to punish insanity acquittees, the State has not surrendered its interest in incapacitative incarceration. The Constitution does not require any particular model for criminal confinement, *Harmelin* v. *Michigan*, 501 U. S. 957, 999 (1991) (KENNEDY, J., concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times

to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"); *Williams* v. *New York*, 337 U. S. 241, 246 (1949), and upon compliance with *In re Winship*, the State may incarcerate on any reasonable basis, see *supra*, at 93. Incapacitation for the protection of society is not an unusual ground for incarceration. "[I]solation of the dangerous has always been considered an important function of the criminal law," *Powell* v. *Texas*, 392 U. S. 514, 539 (1968) (Black, J., concurring), and insanity acquittees are a special class of offenders proved dangerous beyond their own ability to comprehend. The wisdom of incarceration under these circumstances is demonstrated by its high level of acceptance. Every State provides for discretionary or mandatory incarceration of insanity acquittees, 1 LaFave & Scott § 4.6(a), at 510, and as JUSTICE THOMAS observes in his dissent, provisions like those in Louisiana, predicated on dangerousness alone, have been endorsed by the Model Penal Code and adopted by the legislatures of no fewer than 11 other States. See *post*, at 111–112, and nn. 8 and 9.

It remains to be seen whether the majority, by questioning the legitimacy of incapacitative incarceration, puts in doubt the confinement of persons other than insanity acquittees. Parole release provisions often place the burden of proof on the prisoner to prove his lack of dangerousness. To use a familiar example, under the federal parole system in place until the enactment of the Sentencing Guidelines, an inmate could not be released on parole unless he established that his "release would not jeopardize the public welfare." 18 U. S. C. § 4206(a)(2) (1982 ed.), repealed 98 Stat. 2027; see also 28 CFR § 2.18 (1991). This requirement reflected "the incapacitative aspect of the use of imprisonment which has the effect of denying the opportunity for future criminality, at least for a time." U. S. Dept. of Justice, United States Parole Commission Rules and Procedures Manual 69 (July 24, 1989). This purpose is consistent with the parole release provisions of Alabama, Colorado, Hawaii, Massachusetts,

Michigan, New York, and the District of Columbia, to name just a few. See N. Cohen & J. Gobert, Law of Probation and Parole § 3.05, p. 109, and n. 103 (1983). It is difficult for me to reconcile the rationale of incapacitative incarceration, which underlies these regimes, with the opinion of the majority, which discounts its legitimacy.

I also have difficulty with the majority's emphasis on the conditions of petitioner's confinement. In line with JUSTICE O'CONNOR's concurring opinion, see *ante*, at 87–88, the majority emphasizes the fact that petitioner has been confined in a mental institution, see *ante*, at 77–78, 78–79, 82, suggesting that his incarceration might not be unconstitutional if undertaken elsewhere. The majority offers no authority for its suggestion, while JUSTICE O'CONNOR relies on a reading of *Vitek* v. *Jones*, 445 U. S. 480 (1980), which was rejected by the Court in *Jones* v. *United States*. See *ante*, at 87–88, citing *Jones* v. *United States*, *supra*, at 384–385 (Brennan, J., dissenting). The petitioner did not rely on this argument at any point in the proceedings, and we have not the authority to make the assumption, as a matter of law, that the conditions of petitioner's confinement are in any way infirm. Ours is not a case, as in *Vitek* v. *Jones*, where the State has stigmatized petitioner by placing him in a mental institution when he should have been placed elsewhere. *Jones* v. *United States* is explicit on this point: "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect." 463 U. S., at 367, n. 16. Nor is this a case, as in *Washington* v. *Harper*, 494 U. S. 210 (1990), in which petitioner has suffered some further deprivation of liberty to which independent due process protections might attach. Both the fact and conditions of confinement here are attributable to petitioner's criminal conduct and subsequent decision to plead insanity. To the extent the majority relies on the conditions of petitioner's

confinement, its decision is without authority, and most of its opinion is nothing more than confusing dicta.

I submit that today's decision is unwarranted and unwise. I share the Court's concerns about the risks inherent in requiring a committed person to prove what can often be imprecise, but as JUSTICE THOMAS observes in his dissent, this is not a case in which the period of confinement exceeds the gravity of the offense or in which there are reasons to believe the release proceedings are pointless or a sham. *Post*, at 114, n. 10. Petitioner has been incarcerated for less than one-third the statutory maximum for the offenses proved by the State. See La. Rev. Stat. Ann. §§ 14:60 (aggravated burglary) and 14:94 (illegal use of a weapon) (West 1986). In light of these facts, the majority's repeated reference to "indefinite detention," with apparent reference to the potential duration of confinement, and not its lack of a fixed end point, has no bearing on this case. See *ante*, at 77, n. 4, 82, 83, n. 6; cf. *ante*, at 77, n. 4 (curious suggestion that confinement has been extended beyond an initial term of years). It is also significant to observe that this is not a case in which the incarcerated subject has demonstrated his nondangerousness. Within the two months before his release hearing, petitioner had been sent to a maximum security section of the Feliciana Forensic Facility because of altercations with another patient. 563 So. 2d, at 1141. Further, there is evidence in the record which suggests that petitioner's initial claim of insanity may have been feigned. The medical panel that reviewed petitioner's request for release stated that "there is no evidence of mental illness," and indeed that there was "never any evidence of mental illness or disease since admission." App. 10. In sum, it would be difficult to conceive of a less compelling situation for the imposition of sweeping new constitutional commands such as the majority imposes today.

Because the majority conflates the standards for civil and criminal commitment, treating this criminal case as though

it were civil, it upsets a careful balance relied upon by the States, not only in determining the conditions for continuing confinement, but also in defining the defenses permitted for mental incapacity at the time of the crime in question. In my view, having adopted a traditional and well-accepted test for determining criminal insanity, and having complied with the rigorous demands of *In re Winship*, the State possesses the constitutional authority to incarcerate petitioner for the protection of society. I submit my respectful dissent.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Louisiana statutory scheme the Court strikes down today is not some quirky relic of a bygone age, but a codification of the current provisions of the American Law Institute's Model Penal Code. Invalidating this quite reasonable scheme is bad enough; even worse is the Court's failure to explain precisely what is wrong with it. In parts of its opinion, the Court suggests that the scheme is unconstitutional because it provides for the continued confinement of insanity acquittees who, although still dangerous, have "recovered" their sanity. *Ante*, at 77 ("[T]he committed acquittee is *entitled to release* when he has recovered his sanity *or* is no longer dangerous") (emphasis added; internal quotation marks omitted). In other parts of the opinion, the Court suggests—and the concurrence states explicitly—that the constitutional flaw with this scheme is *not* that it provides for the confinement of sane insanity acquittees, but that it (allegedly) provides for their "indefinite" confinement in a mental facility. *Ante*, at 82; *ante*, at 86–87 (O'CONNOR, J., concurring in part and concurring in judgment). Nothing in the Constitution, this Court's precedents, or our society's traditions authorizes the Court to invalidate the Louisiana scheme on either of these grounds. I would therefore affirm the judgment of the Louisiana Supreme Court.

I

The Court errs, in large part, because it fails to examine in detail the challenged statutory scheme and its application in this case. Under Louisiana law, a verdict of "not guilty by reason of insanity" differs significantly from a verdict of "not guilty." A simple verdict of not guilty following a trial means that the State has failed to prove all of the elements of the charged crime beyond a reasonable doubt. See, *e. g.*, *State* v. *Messiah*, 538 So. 2d 175, 180 (La. 1988) (citing *In re Winship*, 397 U. S. 358 (1970)); cf. La. Code Crim. Proc. Ann., Art. 804(A)(1) (West 1969). A verdict of not guilty by reason of insanity, in contrast, means that the defendant *committed the crime*, but established that he was "incapable of distinguishing between right and wrong" with respect to his criminal conduct. La. Rev. Stat. Ann. § 14:14 (West 1986). Insanity, in other words, is an affirmative defense that does not negate the State's proof, but merely "exempt[s the defendant] from criminal responsibility." *Ibid.* As the Louisiana Supreme Court has summarized: "The State's traditional burden of proof is to establish beyond a reasonable doubt all necessary elements of the offense. *Once this rigorous burden of proof has been met*, it having been shown that defendant *has committed a crime*, the defendant . . . bear[s] the burden of establishing his defense of insanity in order to escape punishment." *State* v. *Marmillion*, 339 So. 2d 788, 796 (1976) (emphasis added). See also *State* v. *Surrency*, 88 So. 240, 244 (La. 1921).

Louisiana law provides a procedure for a judge to render a verdict of not guilty by reason of insanity upon a plea without a trial. See La. Code Crim. Proc. Ann., Art. 558.1 (West Supp. 1991). The trial court apparently relied on this procedure when it committed Foucha. See 563 So. 2d 1138, 1139,

n. 3 (La. 1990).[1] After ordering two experts to examine Foucha, the trial court issued the following judgment:

> "After considering the law and the evidence adduced in this matter, the Court finds that the accused, Terry Foucha, is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and to others; and that he was insane at the time of the commission of the above crimes and that he is presently insane." App. 6.

After adjudicating a defendant not guilty by reason of insanity, a trial court must hold a hearing on the issue of dangerousness. The law specifies that "[i]f the court determines that the defendant cannot be released without a danger to others or to himself, it shall order him committed to . . . [a] mental institution." La. Code Crim. Proc. Ann., Art. 654 (West Supp. 1991).[2] "'Dangerous to others' means

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[1] Under La. Code Crim. Proc. Ann., Art. 558.1 (West Supp. 1991), a criminal defendant apparently concedes that he committed the crime, and advances his insanity as the sole ground on which to avoid conviction. Foucha does not challenge the procedures whereby he was adjudicated not guilty by reason of insanity; nor does he deny that he committed the crimes with which he was charged.

[2] Article 654 provides in pertinent part:

"When a defendant is found not guilty by reason of insanity in any [noncapital] felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of

the condition of a person whose behavior or significant threats support a *reasonable expectation* that there is a *substantial risk* that he will inflict physical harm upon another person *in the near future*." La. Rev. Stat. Ann. § 28:2(3) (West 1986) (emphasis added). "'Dangerous to self' means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person." § 28:2(4).

After holding the requisite hearings, the trial court in this case ordered Foucha committed to the Feliciana Forensic Facility. After his commitment, Foucha was entitled, upon request, to another hearing six months later and at yearly intervals after that. See La. Code Crim. Proc. Ann., Art. 655(B) (West Supp. 1991).[3] In addition, Louisiana law provides that a release hearing must be held upon recommendation by the superintendent of a mental institution. See Art. 655(A).[4] In early 1988, Feliciana's superintendent recom-

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law; however, the assignment of reasons shall not delay the implementation of judgment."

[3] Article 655(B) provides:

"A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination."

[4] Article 655(A) provides:

"When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a

mended that Foucha be released, and a three-doctor panel met to review the case. On March 21, 1988, the panel issued a report pursuant to Article 656.[5] The panel concluded that "there is no evidence of mental illness." App. 10. In fact, the panel stated that there was "*never* any evidence of mental illness or disease since admission." *Ibid.* (emphasis added). Although the panel did not discuss whether Foucha was dangerous, it recommended to the trial court that he be conditionally released.

As a result of these recommendations, the trial court scheduled a hearing to determine whether Foucha should be released. Under La. Code Crim. Proc. Ann., Art. 657 (West Supp. 1991),[6] Foucha had the burden at this hearing to prove

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physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney."

[5] Article 656 provides:

"A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or to himself.

"B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physician's report shall be filed with the court."

[6] Article 657 provides:

"After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to

that he could be released without danger to others or to himself. The court appointed two experts (the same doctors who had examined Foucha at the time of his original commitment) to evaluate his dangerousness. These doctors concluded that Foucha "is presently in remission from mental illness," but said that they could not "certify that he would not constitute a menace to himself or to others if released." App. 12. On November 29, 1988, the trial court held the hearing, at which Foucha was represented by counsel. The court concluded that Foucha "is a danger to himself, and to others," *id.*, at 24, and ordered that he be returned to Feliciana.[7]

II

The Court today concludes that Louisiana has denied Foucha both procedural and substantive due process. In my view, each of these conclusions is wrong. I shall discuss them in turn.

A

What the Court styles a "procedural" due process analysis is in reality an equal protection analysis. The Court first asserts (contrary to state law) that Foucha cannot be held as an insanity acquittee once he "becomes" sane. *Ante*, at 78–79.

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himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing."

[7] The Louisiana Supreme Court concluded that the trial court did not abuse its discretion in finding that Foucha had failed to prove that he could be released without danger to others or to himself under La. Code Crim. Proc. Ann., Art. 657 (West Supp. 1991). See 563 So. 2d 1138, 1141 (1990). That issue is not now before us.

That being the case, he is entitled to the same treatment as civil committees. "*[I]f Foucha can no longer be held as an insanity acquittee,*" the Court says, "he is entitled to constitutionally adequate procedures [those afforded in civil commitment proceedings] to establish the grounds for his confinement." *Ante,* at 79 (emphasis added). This, of course, is an equal protection argument (there being no rational distinction between A and B, the State must treat them the same); the Court does not even pretend to examine the fairness of the release procedures the State has provided.

I cannot agree with the Court's conclusion because I believe that there is a real and legitimate distinction between insanity acquittees and civil committees that justifies procedural disparities. Unlike civil committees, who have *not* been found to have harmed society, insanity acquittees have been found in a judicial proceeding to have committed a criminal act.

That distinction provided the *ratio decidendi* for our most relevant precedent, *Jones* v. *United States,* 463 U. S. 354 (1983). That case involved a man who had been *automatically* committed to a mental institution after being acquitted of a crime by reason of insanity in the District of Columbia (*i. e.,* he had not been given the procedures afforded to civil committees). We rejected both of his procedural due process challenges to his commitment. First, we held that an insanity acquittal justified automatic commitment of the acquittee (even though he might *presently* be sane), because Congress was entitled to decide that the verdict provided a *reasonable basis* for inferring dangerousness and insanity at the time of commitment. *Id.,* at 366. The Government's interest in avoiding a *de novo* commitment hearing following every insanity acquittal, we said, outweighed the acquittee's interest in avoiding unjustified institutionalization. *Ibid.* Second, we held that the Constitution did not require, as a predicate for the indefinite commitment of insanity acquittees, proof of insanity by "clear and convincing" evidence, as

required for civil committees by *Addington* v. *Texas*, 441 U. S. 418 (1979). There are, we recognized, "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof." *Jones*, 463 U. S., at 367. In sharp contrast to a civil committee, an insanity acquittee is institutionalized only where "the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness," and thus "there is good reason for diminished concern as to the risk of error." *Ibid.* (emphasis in original). "More important, the proof that he committed a criminal act . . . eliminates the risk that he is being committed for mere 'idiosyncratic behavior.'" *Ibid.* Thus, we concluded, the preponderance of the evidence standard comports with due process for commitment of insanity acquittees. *Id.*, at 368. "[I]nsanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Id.*, at 370.

The Court today attempts to circumvent *Jones* by declaring that a State's interest in treating insanity acquittees differently from civil committees evaporates the instant an acquittee "becomes sane." I do not agree. As an initial matter, I believe that it is unwise, given our present understanding of the human mind, to suggest that a determination that a person has "regained sanity" is precise. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." *Ake* v. *Oklahoma*, 470 U. S. 68, 81 (1985). Indeed,

> "[w]e have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment.' The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular

deference to reasonable legislative judgments." *Jones, supra,* at 365, n. 13 (quoting *Greenwood* v. *United States,* 350 U. S. 366, 375 (1956); citations omitted).

In this very case, the panel that evaluated Foucha in 1988 concluded that there was "*never* any evidence of mental illness or disease since admission," App. 10; the trial court, of course, concluded that Foucha was "presently insane," *id.,* at 6, at the time it accepted his plea and sent him to Feliciana.

The distinction between civil committees and insanity acquittees, after all, turns *not* on considerations of present sanity, but instead on the fact that the latter have "already unhappily manifested the reality of anti-social conduct," *Dixon* v. *Jacobs,* 138 U. S. App. D. C. 319, 334, 427 F. 2d 589, 604 (1970) (Leventhal, J., concurring). "*[T]he prior anti-social conduct* of an insanity acquittee justifies treating such a person differently from ones otherwise civilly committed for purposes of deciding whether the patient should be released." *Powell* v. *Florida,* 579 F. 2d 324, 333 (CA5 1978) (emphasis added); see also *United States* v. *Ecker,* 177 U. S. App. D. C. 31, 50, 543 F. 2d 178, 197 (1976), cert. denied, 429 U. S. 1063 (1977). While a State may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is "restored," the State is required to ignore his criminal act, and to renounce all interest in protecting society from him. "The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society." *Hickey* v. *Morris,* 722 F. 2d 543, 548 (CA9 1983).

Furthermore, the Federal Constitution does not require a State to "ignore the danger of 'calculated abuse of the insanity defense.'" *Warren* v. *Harvey,* 632 F. 2d 925, 932 (CA2 1980) (quoting *United States* v. *Brown,* 155 U. S. App. D. C. 402, 407, 478 F. 2d 606, 611 (1973)). A State that decides to offer its criminal defendants an insanity defense, which the defendant himself is given the choice of invoking, is surely

allowed to attach to that defense certain consequences that prevent abuse. Cf. *Lynch* v. *Overholser*, 369 U. S. 705, 715 (1962) ("Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity").

> "In effect, the defendant, by raising the defense of insanity—and he alone can raise it—postpones a determination of his present mental health and acknowledges the right of the state, upon accepting his plea, to detain him for diagnosis, care, and custody in a mental institution until certain specified conditions are met. . . . [C]ommitment via the criminal process . . . thus is more akin to 'voluntary' than 'involuntary' civil commitment." Goldstein & Katz, Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 Yale L. J. 225, 230 (1960) (footnote omitted).

A State may reasonably decide that the integrity of an insanity-acquittal scheme requires the continued commitment of insanity acquittees who remain dangerous. Surely, the citizenry would not long tolerate the insanity defense if a serial killer who convinces a jury that he is not guilty by reason of insanity is returned to the streets immediately after trial by convincing a different factfinder that he is not in fact insane.

As the American Law Institute has explained:

> "It seemed preferable to the Institute to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, [an insanity acquittee] may still be dangerous because of factors in his personality and background other than mental disease. Also, such a

> standard provides a means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal." Model Penal Code §4.08, Comment 3, pp. 259–260 (1985).[8]

That this is a reasonable legislative judgment is underscored by the fact that it has been made by no fewer than 11 state legislatures, in addition to Louisiana's, which expressly provide that insanity acquittees shall not be released as long as they are dangerous, regardless of sanity.[9]

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[8] The relevant provision of the Model Penal Code, strikingly similar to Article 657 of the Louisiana Code of Criminal Procedure, see *supra*, n. 6, provides in part as follows:

"If the Court is satisfied by the report filed pursuant to Subsection (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released." Model Penal Code §4.08(3) (Proposed Official Draft 1962).

[9] See Cal. Penal Code Ann. §1026.2(e) (West Supp. 1992) (insanity acquittee not entitled to release until court determines that he "will not be a danger to the health and safety of others, including himself"); Del. Code Ann., Tit. 11, §403(b) (1987) (insanity acquittee shall be kept institutionalized until court "is satisfied that the public safety will not be endangered by his release"); Haw. Rev. Stat. §704–415 (1985) (insanity acquittee not entitled to release until court satisfied that acquittee "may safely be discharged or released"); Iowa Rule Crim. Proc. 21.8(e) (insanity acquittee not entitled to release as long as "court finds that continued custody and treatment are necessary to protect the safety of the [acquittee's] self or others"); Kan. Stat. Ann. §22–3428(3) (Supp. 1990) (insanity acquittee not entitled to release until "the court finds by clear and convincing evidence that [he] will not be likely to cause harm to self or others if released or discharged"); Mont. Code Ann. §46–14–301(3) (1991) (insanity acquittee not entitled to release until he proves that he "may safely be released");

The Court suggests an alternative "procedural" due process theory that is, if anything, even less persuasive than its principal theory. "[K]eeping Foucha against his will *in a mental institution* is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." *Ante*, at 78 (emphasis added). The Court cites *Vitek* v. *Jones*, 445 U. S. 480 (1980), as support. There are two problems with this theory. First, it is illogical: Louisiana cannot possibly extend Foucha's incarceration by adding the procedures afforded to civil committees, since it is impossible to civilly commit someone who is not presently

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N. J. Stat. Ann. § 2C:4–9 (West 1982) (insanity acquittee not entitled to release or discharge until court satisfied that he is not "danger to himself or others"); N. C. Gen. Stat. § 122C–268.1(i) (Supp. 1991) (insanity acquittee not entitled to release until he "prove[s] by a preponderance of the evidence that he is no longer dangerous to others"); Va. Code Ann. § 19.2–181(3) (1990) (insanity acquittee not entitled to release until he proves "that he is not insane or mentally retarded *and* that his discharge would not be dangerous to the public peace and safety or to himself" (emphasis added)); Wash. Rev. Code § 10.77.200(2) (1990) ("The burden of proof [at a release hearing] shall be upon the [insanity acquittee] to show by a preponderance of the evidence that [he] may be finally discharged without substantial danger to other persons, and without presenting a substantial likelihood of committing felonious acts jeopardizing public safety or security"); Wis. Stat. § 971.17(4) (Supp. 1991) (insanity acquittee not entitled to release where court "finds by clear and convincing evidence that the [acquittee] would pose a significant risk of bodily harm to himself or herself or to others of serious property damage if conditionally released").

The Court and the concurrence dispute this list of statutes. *Ante*, at 84–85, n. 6; *ante*, at 89 (O'CONNOR, J., concurring in part and concurring in judgment). They note that two of the States have enacted new laws, not yet effective, modifying their current absolute prohibitions on the release of dangerous insanity acquittees; that courts in two other States have apparently held that mental illness is a prerequisite to confinement; and that three of the States place caps of some sort on the duration of the confinement of insanity acquittees. Those criticisms miss my point. I cite the 11 state statutes above only to show that the legislative judgments underlying Louisiana's scheme are far from unique or freakish, and that there is no well-established practice in our society, either past or present, of automatically releasing sane-but-dangerous insanity acquittees.

mentally ill. Second, the theory is not supported by *Vitek*. Stigmatization (our concern in *Vitek*) is simply not a relevant consideration where insanity acquittees are involved. As we explained in *Jones:* "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect." 463 U. S., at 367, n. 16; see also *Warren* v. *Harvey*, 632 F. 2d, at 931–932. (This is in sharp contrast to situations involving civil committees. See *Addington*, 441 U. S., at 425–426; *Vitek*, *supra*, at 492–494.) It is implausible, in my view, that a person who chooses to plead not guilty by reason of insanity and then spends several years in a mental institution becomes unconstitutionally stigmatized by continued confinement in the institution after "regaining" sanity.

In my view, there was no procedural due process violation in this case. Articles 654, 655, and 657 of the Louisiana Code of Criminal Procedure, as noted above, afford insanity acquittees the opportunity to obtain release by demonstrating at regular intervals that they no longer pose a threat to society. These provisions also afford judicial review of such determinations. Pursuant to these procedures, and based upon testimony of experts, the Louisiana courts determined not to release Foucha at this time because the evidence did not show that he ceased to be dangerous. Throughout these proceedings, Foucha was represented by state-appointed counsel. I see no plausible argument that these procedures denied Foucha a fair hearing on the issue involved or that Foucha needed additional procedural protections.[10] See *Mathews* v. *Eldridge*, 424 U. S. 319 (1976); *Patterson* v. *New York*, 432 U. S. 197 (1977); cf. *Addington*, *supra*, at 427–432;

[10] Foucha has not argued that the State's procedures, *as applied*, are a sham. This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.

Jones, *supra*, at 363–368; *Benham* v. *Ledbetter*, 785 F. 2d 1480, 1486–1488 (CA11 1986).[11]

B

The Court next concludes that Louisiana's statutory scheme must fall because it violates Foucha's *substantive* due process rights. *Ante*, at 80–83, and n. 6. I disagree. Until today, I had thought that the analytical framework for evaluating substantive due process claims was relatively straightforward. Certain substantive rights we have recognized as "fundamental"; legislation trenching upon these is subjected to "strict scrutiny," and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system; we have consistently emphasized that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Regents of University of Michigan* v. *Ewing*, 474 U. S. 214, 226 (1985) (internal quotation marks omitted). Except in the unusual case where a fundamental right is infringed, then, federal judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting. See, *e. g.*, *Bowers* v. *Hardwick*, 478 U. S. 186, 191–196 (1986).

In striking down Louisiana's scheme as a violation of substantive rights guaranteed by the Due Process Clause, the

[11] As explained above, the Court's "procedural" due process analysis is essentially an equal protection analysis: The Court first disregards the differences between "sane" insanity acquittees and civil committees, and then simply asserts that Louisiana cannot deny Foucha the procedures it gives civil committees. A plurality repeats this analysis in its cumulative equal protection section. See *ante*, at 84–86. As explained above, I believe that there are legitimate differences between civil committees and insanity acquittees, even after the latter have "become" sane. Therefore, in my view, Louisiana has not denied Foucha equal protection of the laws. Cf. *Jones* v. *United States*, 463 U. S. 354, 362, n. 10 (1983).

Court today ignores this well-established analytical framework. First, the Court never explains whether we are dealing here with a fundamental right, and, if so, what right. Second, the Court never discloses what standard of review applies. Indeed, the Court's opinion is contradictory on both these critical points.

As to the first point: The Court begins its substantive due process analysis by invoking the substantive right to "[f]reedom from bodily restraint." *Ante*, at 80. Its discussion then proceeds as if the problem here is that Foucha, an insanity acquittee, continues to be *confined* after recovering his sanity, *ante*, at 80–81; thus, the Court contrasts this case to *United States* v. *Salerno*, 481 U. S. 739 (1987), a case involving the confinement of pretrial detainees. But then, abruptly, the Court shifts liberty interests. The liberty interest at stake here, we are told, is *not* a liberty interest in being free "from bodily restraint," but instead the more specific (and heretofore unknown) "liberty interest under the Constitution *in being freed from [1] indefinite confinement [2] in a mental facility.*" *Ante*, at 82 (emphasis added). See also *ante*, at 86–87 (O'CONNOR, J., concurring in part and concurring in judgment). So the problem in this case is apparently *not* that Louisiana continues to confine insanity acquittees who have "become" sane (although earlier in the opinion the Court interprets our decision in *Jones* as having held that such confinement is unconstitutional, see *ante*, at 77–78), but that under Louisiana law, "sane" insanity acquittees may be held "indefinitely" "in a mental facility."

As to the second point: "A dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 610 (1990) (O'CONNOR, J., dissenting). The standard of review determines when the Due Process Clause of the Fourteenth Amendment will override a State's substantive policy choices, as reflected in its laws. The Court initially says that "[d]ue process requires that the na-

ture of commitment bear some *reasonable relation* to the purpose for which the individual is committed." *Ante*, at 79 (emphasis added). Later in its opinion, however, the Court states that the Louisiana scheme violates substantive due process *not* because it is not "reasonably related" to the State's purposes, but instead because its detention provisions are not "sharply focused" or "carefully limited," in contrast to the scheme we upheld in *Salerno*. *Ante*, at 81. Does that mean that the same standard of review applies here that we applied in *Salerno*, and, if so, what is that standard? The Court quite pointedly avoids answering these questions. Similarly, JUSTICE O'CONNOR does not reveal exactly what standard of review she believes applicable, but appears to advocate a heightened standard heretofore unknown in our case law. *Ante*, at 87–88 ("It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if . . . the nature and duration of detention were *tailored* to reflect *pressing* public safety concerns related to the acquittee's continuing dangerousness" (emphasis added)).

To the extent the Court invalidates the Louisiana scheme on the ground that it violates some general substantive due process right to "freedom from bodily restraint" that triggers strict scrutiny, it is wrong—and dangerously so. To the extent the Court suggests that Louisiana has violated some more limited right to freedom from indefinite commitment in a mental facility (a right, by the way, never asserted by Foucha in this or any other court) that triggers some unknown standard of review, it is also wrong. I shall discuss these two possibilities in turn.

1

I fully agree with the Court, *ante*, at 80, and with JUSTICE KENNEDY, *ante*, at 90, that freedom from involuntary confinement is at the heart of the "liberty" protected by the Due Process Clause. But a liberty interest *per se* is not the same thing as a fundamental right. Whatever the exact scope of

the fundamental right to "freedom from bodily restraint" recognized by our cases,[12] it certainly cannot be defined at the exceedingly great level of generality the Court suggests today. There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to "freedom from bodily restraint" applicable to *all* persons in *all* contexts. If convicted prisoners could claim such a right, for example, we would subject all prison sentences to strict scrutiny. This we have consistently refused to do. See, *e. g.*, *Chapman* v. *United States*, 500 U. S. 453, 465 (1991).[13]

The critical question here, then, is whether *insanity acquittees* have a fundamental right to "freedom from bodily

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[12] The Court cites only *Youngberg* v. *Romeo*, 457 U. S. 307, 316 (1982), in support of its assertion that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *ante*, at 80. What "freedom from bodily restraint" meant in that case, however, is completely different from what the Court uses the phrase to mean here. *Youngberg* involved the substantive due process rights of an institutionalized, mentally retarded patient who had been restrained *by shackles placed on his arms* for portions of each day. See 457 U. S., at 310, and n. 4. What the Court meant by "freedom from bodily restraint," then, was quite literally freedom not to be physically strapped to a bed. That case in no way established the broad "freedom from bodily restraint"—apparently meaning freedom from *all* involuntary confinement—that the Court discusses today.

[13] Unless the Court wishes to overturn this line of cases, its substantive due process analysis must rest entirely on the fact that an insanity acquittee has not been *convicted* of a crime. Conviction is, of course, a significant event. But I am not sure that it deserves talismanic significance. Once a State proves beyond a reasonable doubt that an individual has committed a crime, it is, at a minimum, not obviously a matter of federal constitutional concern whether the State proceeds to label that individual "guilty," "guilty but insane," or "not guilty by reason of insanity." A State may just as well decide to label its verdicts "A," "B," and "C." It is surely rather odd to have rules of federal constitutional law turn entirely upon the *label* chosen by a State. Cf. *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 441 (1959) (constitutionality of state action should not turn on "magic words").

restraint" that triggers strict scrutiny of their confinement. Neither Foucha nor the Court provides any evidence that our society has ever recognized any such right. To the contrary, historical evidence shows that many States have long provided for the continued institutionalization of insanity acquittees who remain dangerous. See, *e. g.*, H. Weihofen, Insanity as a Defense in Criminal Law 294–332 (1933); A. Goldstein, The Insanity Defense 148–149 (1967).

Moreover, this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees. To the contrary, until today we have subjected the substance of such laws only to very deferential review. Thus, in *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972), we held that Indiana's provisions for the indefinite institutionalization of incompetent defendants violated substantive due process because they did not bear any "reasonable" relation to the purpose for which the defendant was committed. Similarly, in *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975), we held that the confinement of a nondangerous mentally ill person was unconstitutional *not* because the State failed to show a compelling interest and narrow tailoring, but because the State had *no legitimate interest whatsoever* to justify such confinement. See *id.*, at 575–576. See also *id.*, at 580 (Burger, C. J., concurring) ("Commitment must be justified on the basis of a *legitimate* state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist" (emphasis added)).

Similarly, in *Jones*, we held (in addition to the procedural due process holdings described above) that there was no substantive due process bar to holding an insanity acquittee beyond the period for which he could have been incarcerated if convicted. We began by explaining the standard for our analysis: "The Due Process Clause 'requires that the nature

and duration of commitment bear some *reasonable* relation to the purpose for which the individual is committed.'" 463 U. S., at 368 (emphasis added) (quoting *Jackson, supra,* at 738). We then held that *"[i]n light of the congressional purposes underlying commitment of insanity acquittees* [in the District of Columbia,]" which we identified as treatment of the insanity acquittee's mental illness and protection of the acquittee and society, "petitioner clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment." 463 U. S., at 368 (emphasis added). Given that the commitment law was reasonably related to Congress' purposes, this Court had no basis for invalidating it as a matter of substantive due process.

It is simply wrong for the Court to assert today that we "held" in *Jones* that "'the committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.'" *Ante,* at 77 (quoting *Jones,* 463 U. S., at 368).[14] We specifically noted in *Jones* that *no* issue regarding the standards for the release of insanity acquittees was before us. *Id.,* at 363, n. 11. The question we were answering in the part of *Jones* from which the Court quotes was whether it is permissible to hold an insanity acquittee for a period longer than he could have been incarcerated if convicted, *not* whether it is permissible to hold him once he becomes "sane." As noted above, our substantive due process analysis in *Jones* was straightforward: Did the means chosen by Congress (commitment of insanity acquittees until

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[14] If this were really a "holding" of *Jones,* then I am at a loss to understand JUSTICE O'CONNOR's assertion that the Court today does *not* hold "that Louisiana may never confine dangerous insanity acquittees after they regain mental health." *Ante,* at 87. Either it is true that, as a matter of substantive due process, an insanity acquittee is "'entitled to release when he has recovered his sanity,'" *ante,* at 77 (quoting *Jones,* 463 U. S., at 368), or it is not. The Court apparently cannot make up its mind.

they have recovered their sanity or are no longer dangerous) reasonably fit Congress' ends (treatment of the acquittee's mental illness and protection of society from his dangerousness)? [15]

In its arguments before this Court, Louisiana chose to place primary reliance on our decision in *United States* v. *Salerno*, 481 U. S. 739 (1987), in which we upheld provisions of the Bail Reform Act of 1984 that allowed *limited* pretrial detention of criminal suspects. That case, as the Court notes, *ante*, at 81–83, is readily distinguishable. Insanity acquittees, in sharp and obvious contrast to pretrial detainees, have *had* their day in court. Although they have not been convicted of crimes, neither have they been exonerated, as they would have been upon a determination of "not guilty" *simpliciter*. Insanity acquittees thus stand in a fundamentally different position from persons who have not been adjudicated to have committed criminal acts. That is what distinguishes this case (and what distinguished *Jones*) from *Salerno* and *Jackson* v. *Indiana*, *supra*. In *Jackson*, as in *Salerno*, the State had not proved beyond a reasonable doubt that the accused had committed criminal acts or otherwise was dangerous. See *Jones*, *supra*, at 364, n. 12. The Court disregards this critical distinction, and apparently deems applicable the same scrutiny to pretrial de-

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[15] As may be apparent from the discussion in text, we have not been entirely precise as to the appropriate standard of review of legislation in this area. Some of our cases (*e. g.*, *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975)) have used the language of rationality review; others (*e. g.*, *Jackson* v. *Indiana*, 406 U. S. 715 (1972)) have used the language of "reasonableness," which may imply a somewhat heightened standard; still others (*e. g.*, *Jones*) have used the language of both rationality and reasonableness. What *is* clear from our cases is that the appropriate scrutiny is highly deferential, not strict. We need not decide in this case which precise standard is applicable, since the laws under attack here are at the very least reasonable.

tainees as to persons determined in a judicial proceeding to have committed a criminal act.[16]

If the Court indeed means to suggest that *all* restrictions on "freedom from bodily restraint" are subject to strict scrutiny, it has (at a minimum) wrought a revolution in the treatment of the mentally ill. Civil commitment as we know it would almost certainly be unconstitutional; only in the rarest of circumstances will a State be able to show a "compelling interest," and one that can be served in no other way, in involuntarily institutionalizing a person. All procedures involving the confinement of insanity acquittees and civil committees would require revamping to meet strict scrutiny. Thus, to take one obvious example, the *automatic* commitment of insanity acquittees that we expressly upheld in *Jones* would be clearly unconstitutional, since it is inconceivable that such commitment of persons who may well *presently* be sane and nondangerous could survive strict scrutiny. (In *Jones*, of course, we applied no such scrutiny; we upheld the practice not because it was justified by a compelling in-

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[16] The Court asserts that the principles set forth in this dissent necessarily apply not only to insanity acquittees, but also to convicted prisoners. "JUSTICE THOMAS' rationale for continuing to hold the insanity acquittee would surely justify treating the convicted felon in the same way, and if put to it, it appears that he would permit it." *Ante*, at 83, n. 6. That is obviously not so. If Foucha had been convicted of the crimes with which he was charged and sentenced to the statutory maximum of 32 years in prison, the State would not be entitled to extend his sentence at the end of that period. To do so would obviously violate the prohibition on *ex post facto* laws set forth in Art. I, § 10, cl. 1. But Foucha was not sentenced to incarceration for any definite period of time; to the contrary, he pleaded not guilty by reason of insanity and was ordered institutionalized *until he was able to meet the conditions statutorily prescribed for his release.* To acknowledge, as I do, that it is constitutionally permissible for a State to provide for the continued confinement of an insanity acquittee who remains dangerous is obviously quite different than to assert that the State is allowed to confine *anyone* who is dangerous for as long as it wishes.

terest, but because it was based on reasonable legislative inferences about continuing insanity and dangerousness.)

2

As explained above, the Court's opinion is profoundly ambiguous on the central question in this case: Must the State of Louisiana release Terry Foucha now that he has "regained" his sanity? In other words, is the defect in Louisiana's statutory scheme that it provides for the confinement of insanity acquittees who have recovered their sanity, or instead that it allows the State to confine sane insanity acquittees (1) indefinitely (2) in a mental facility? To the extent the Court suggests the former, I have already explained why it is wrong. I turn now to the latter possibility, which also is mistaken.

To begin with, I think it is somewhat misleading to describe Louisiana's scheme as providing for the "indefinite" commitment of insanity acquittees. As explained above, insanity acquittees are entitled to a release hearing every year at their request, and at any time at the request of a facility superintendent. Like the District of Columbia statute at issue in *Jones*, then, Louisiana's statute provides for "indefinite" commitment only to the extent that an acquittee is unable to satisfy the substantive standards for release. If the Constitution did not require a cap on the acquittee's confinement in *Jones*, why does it require one here? The Court and JUSTICE O'CONNOR have no basis for suggesting that either this Court or the society of which it is a part has recognized some general fundamental right to "freedom from indefinite commitment." If that were the case, of course, *Jones* would have involved strict scrutiny and is wrongly decided.

Furthermore, any concerns about "indefinite" commitment here are entirely hypothetical and speculative. Foucha has been confined for eight years. Had he been convicted of the crimes with which he was charged, he could have been incar-

cerated for 32 years. See La. Rev. Stat. Ann. §§ 14:60, 14:94 (West 1986). Thus, I find quite odd JUSTICE O'CONNOR's suggestion, *ante*, at 89, that this case might be different had Louisiana, like the State of Washington, limited confinement to the period for which a defendant might have been imprisoned if convicted. Foucha, of course, would be in precisely the same position today—and for the next 24 years—had the Louisiana statute included such a cap. Thus, the Court apparently finds fault with the Louisiana statute *not* because it has been applied to Foucha in an unconstitutional manner, but because the Court can imagine it being applied to *someone else* in an unconstitutional manner. That goes against the first principles of our jurisprudence. See, *e. g.*, *Salerno*, 481 U. S., at 745 ("The fact that [a detention statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment").[17]

Finally, I see no basis for holding that the Due Process Clause *per se* prohibits a State from continuing to confine in a "mental institution"—the federal constitutional definition of which remains unclear—an insanity acquittee who has recovered his sanity. As noted above, many States have long provided for the continued detention of insanity acquittees who remain dangerous. Neither Foucha nor the Court present any evidence that these States have traditionally transferred such persons from mental institutions to other detention facilities. Therefore, there is simply no basis for this Court to recognize a "fundamental right" for a sane insanity acquittee to be transferred out of a mental facility. "In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest

[17] I fully agree with JUSTICE O'CONNOR, *ante*, at 88, that there would be a serious question of rationality had Louisiana sought to institutionalize a sane insanity acquittee for a period longer than he might have been imprisoned if convicted. But that is simply not the case here.

denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122 (1989) (plurality opinion).

Removing sane insanity acquittees from mental institutions may make eminent sense as a policy matter, but the Due Process Clause does not require the States to conform to the policy preferences of federal judges. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers*, 478 U. S., at 194. I have no idea what facilities the Court or JUSTICE O'CONNOR believe the Due Process Clause mandates for the confinement of sane-but-dangerous insanity acquittees. Presumably prisons will not do, since imprisonment is generally regarded as "punishment." May a State designate a wing of a mental institution or prison for sane insanity acquittees? May a State mix them with other detainees? Neither the Constitution nor our society's traditions provide any answer to these questions.[18]

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"So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin* v. *California*, 342 U. S. 165, 172 (1952), or interferes

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[18] *In particular circumstances*, of course, it may be unconstitutional for a State to confine in a mental institution a person who is no longer insane. This would be a different case had Foucha challenged specific conditions of confinement—for instance, being forced to share a cell with an insane person, or being involuntarily treated after recovering his sanity. But Foucha has alleged nothing of the sort—all we know is that the State continues to confine him in a place called the Feliciana Forensic Facility. It is by no means clear that such confinement is *invariably* worse than, for example, confinement in a jail or other detention center—for all we know, an institution may provide a quieter, less violent atmosphere. I do not mean to suggest that that is the case—my point is only that the issue cannot be resolved in the abstract.

with rights 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U. S. 319, 325–326 (1937)." *Salerno*, *supra*, at 746. The legislative scheme the Court invalidates today is, at the very least, substantively reasonable. With all due respect, I do not remotely think it can be said that the laws in question "offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Therefore, in my view, this Court is not entitled, as a matter of substantive due process, to strike them down.

I respectfully dissent.

Syllabus

RIGGINS *v.* NEVADA

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 90–8466. Argued January 15, 1992—Decided May 18, 1992

When petitioner Riggins, while awaiting a Nevada trial on murder and robbery charges, complained of hearing voices and having sleep problems, a psychiatrist prescribed the antipsychotic drug Mellaril. After he was found competent to stand trial, Riggins made a motion to suspend the Mellaril's administration until after his trial, arguing that its use infringed upon his freedom, that its effect on his demeanor and mental state during trial would deny him due process, and that he had the right to show jurors his true mental state when he offered an insanity defense. After hearing the testimony of doctors who had examined Riggins, the trial court denied the motion with a one-page order giving no indication of its rationale. At Riggins' trial, he presented his insanity defense and testified, was convicted, and was sentenced to death. In affirming, the State Supreme Court held, *inter alia*, that expert testimony presented at trial was sufficient to inform the jury of the Mellaril's effect on Riggins' demeanor and testimony.

Held: The forced administration of antipsychotic medication during Riggins' trial violated rights guaranteed by the Sixth and Fourteenth Amendments. Pp. 133–138.

(a) The record narrowly defines the issues in this case. Administration of Mellaril was involuntary once Riggins' motion to terminate its use was denied, but its administration was medically appropriate. In addition, Riggins' Eighth Amendment argument that the drug's administration denied him the opportunity to show jurors his true mental condition at the sentencing hearing was not raised below or in the petition for certiorari and, thus, will not be considered by this Court. P. 133.

(b) A pretrial detainee has an interest in avoiding involuntary administration of antipsychotic drugs that is protected under the Due Process Clause. Cf. *Washington* v. *Harper*, 494 U. S. 210; *Bell* v. *Wolfish*, 441 U. S. 520, 545. Once Riggins moved to terminate his treatment, the State became obligated to establish both the need for Mellaril and its medical appropriateness. Cf. *Harper*, *supra*, at 227. Due process certainly would have been satisfied had the State shown that the treatment was medically appropriate and, considering less intrusive alternatives, essential for Riggins' own safety or the safety of others. The State also might have been able to justify the treatment, if medically appro-

priate, by showing that an adjudication of guilt or innocence could not be obtained by using less intrusive means. However, the trial court allowed the drug's administration to continue without making *any* determination of the need for this course or *any* findings about reasonable alternatives, and it failed to acknowledge Riggins' liberty interest in freedom from antipsychotic drugs. Pp. 133–137.

(c) There is a strong possibility that the trial court's error impaired Riggins' constitutionally protected trial rights. Efforts to prove or disprove actual prejudice from the record before this Court would be futile, and guesses as to the trial's outcome had Riggins' motion been granted would be speculative. While the precise consequences of forcing Mellaril upon him cannot be shown from a trial transcript, the testimony of doctors who examined Riggins establishes the strong possibility that his defense was impaired. Mellaril's side effects may have impacted not only his outward appearance, but also his testimony's content, his ability to follow the proceedings, or the substance of his communication with counsel. Thus, even if the expert testimony presented at trial allowed jurors to assess Riggins' demeanor fairly, an unacceptable risk remained that forced medication compromised his trial rights. Pp. 137–138.

(d) While trial prejudice can sometimes be justified by an essential state interest, the record here contains no finding to support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy. P. 138.

107 Nev. 178, 808 P. 2d 535, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 138. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined except as to Part II–A, *post*, p. 146.

Mace J. Yampolsky argued the cause for petitioner. With him on the briefs were *Jay Topkis*, *Neal H. Klausner*, and *Steven C. Herzog*.

James Tufteland argued the cause for respondent. With him on the brief was *Rex Bell*.*

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*Briefs of *amici curiae* urging reversal were filed for the Coalition for Fundamental Rights of Equality of Ex-patients by *Peter Margulies*, *Herbert Semmel*, and *Patrick Reilly*; for the National Association of Criminal

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner David Riggins challenges his murder and robbery convictions on the ground that the State of Nevada unconstitutionally forced an antipsychotic drug upon him during trial. Because the Nevada courts failed to make findings sufficient to support forced administration of the drug, we reverse.

I

During the early hours of November 20, 1987, Paul Wade was found dead in his Las Vegas apartment. An autopsy revealed that Wade died from multiple stab wounds, including wounds to the head, chest, and back. David Riggins was arrested for the killing 45 hours later.

A few days after being taken into custody, Riggins told Dr. R. Edward Quass, a private psychiatrist who treated patients at the Clark County Jail, about hearing voices in his head and having trouble sleeping. Riggins informed Dr. Quass that he had been successfully treated with Mellaril in the past. Mellaril is the trade name for thioridazine, an antipsychotic drug. After this consultation, Dr. Quass prescribed Mellaril at a level of 100 milligrams per day. Because Riggins continued to complain of voices and sleep problems in the following months, Dr. Quass gradually increased the Mellaril prescription to 800 milligrams per day. Riggins also received a prescription for Dilantin, an antiepileptic drug.

In January 1988, Riggins successfully moved for a determination of his competence to stand trial. App. 6. Three

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Defense Lawyers by *David M. Eldridge;* and for Nevada Attorneys for Criminal Justice by *Kevin M. Kelly.*

Briefs of *amici curiae* were filed for the State of Louisiana et al. by *William J. Guste, Jr.,* Attorney General of Louisiana, and *M. Patricia Jones* and *Kathleen E. Petersen,* Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Charles M. Oberly III* of Delaware and *Michael E. Carpenter* of Maine; and for the American Psychiatric Association by *Richard G. Taranto* and *Joel I. Klein.*

court-appointed psychiatrists performed examinations during February and March, while Riggins was taking 450 milligrams of Mellaril daily. Dr. William O'Gorman, a psychiatrist who had treated Riggins for anxiety in 1982, and Dr. Franklin Master concluded that Riggins was competent to stand trial. The third psychiatrist, Dr. Jack Jurasky, found that Riggins was incompetent. The Clark County District Court determined that Riggins was legally sane and competent to stand trial, *id.*, at 13, so preparations for trial went forward.

In early June, the defense moved the District Court for an order suspending administration of Mellaril and Dilantin until the end of Riggins' trial. *Id.*, at 20. Relying on both the Fourteenth Amendment and the Nevada Constitution, Riggins argued that continued administration of these drugs infringed upon his freedom and that the drugs' effect on his demeanor and mental state during trial would deny him due process. Riggins also asserted that, because he would offer an insanity defense at trial, he had a right to show jurors his "true mental state." *Id.*, at 22. In response, the State noted that Nevada law prohibits the trial of incompetent persons, see Nev. Rev. Stat. § 178.400 (1989), and argued that the court therefore had authority to compel Riggins to take medication necessary to ensure his competence. App. 31–32.

On July 14, 1988, the District Court held an evidentiary hearing on Riggins' motion. At the hearing, Dr. Master "guess[ed]" that taking Riggins off medication would not noticeably alter his behavior or render him incompetent to stand trial. Record 412. Dr. Quass testified that, in his opinion, Riggins would be competent to stand trial even without the administration of Mellaril, but that the effects of Mellaril would not be noticeable to jurors if medication continued. *Id.*, at 443–445. Finally, Dr. O'Gorman told the court that Mellaril made the defendant calmer and more re-

laxed but that an excessive dose would cause drowsiness. *Id.*, at 464–466. Dr. O'Gorman was unable to predict how Riggins might behave if taken off antipsychotic medication, yet he questioned the need to give Riggins the high dose he was receiving. *Id.*, at 474–476. The court also had before it a written report in which Dr. Jurasky held to his earlier view that Riggins was incompetent to stand trial and predicted that if taken off Mellaril the defendant "would most likely regress to a manifest psychosis and become extremely difficult to manage." App. 19.

The District Court denied Riggins' motion to terminate medication with a one-page order that gave no indication of the court's rationale. *Id.*, at 49. Riggins continued to receive 800 milligrams of Mellaril each day through the completion of his trial the following November.

At trial, Riggins presented an insanity defense and testified on his own behalf. He indicated that on the night of Wade's death he used cocaine before going to Wade's apartment. Riggins admitted fighting with Wade, but claimed that Wade was trying to kill him and that voices in his head said that killing Wade would be justifiable homicide. A jury found Riggins guilty of murder with use of a deadly weapon and robbery with use of a deadly weapon. After a penalty hearing, the same jury set the murder sentence at death.

Riggins presented several claims to the Nevada Supreme Court, among them that forced administration of Mellaril denied him the ability to assist in his own defense and prejudicially affected his attitude, appearance, and demeanor at trial. This prejudice was not justified, Riggins said in his opening brief, because the State neither demonstrated a need to administer Mellaril nor explored alternatives to giving him 800 milligrams of the drug each day. Record 1020. Riggins amplified this claim in his reply brief, objecting that the State intruded upon his constitutionally protected lib-

erty interest in freedom from antipsychotic drugs without considering less intrusive options. Riggins argued:

> "In *United States v. Bryant*, 670 F. Supp. 840, 843 (Minn. 1987)[,] the court, in reference to medicating prisoners against their will, stated that 'courts have recognized a *protectable liberty interest* . . . in the freedom to avoid unwanted medication with such drugs.' The court in so stating cited *Bee v. Greaves*, 744 F. 2d 1387 (10th Cir. 1984)[,] which addressed the issue of medicating pre-trial detainees and stated that 'less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to antipsychotic drugs.' In the case at bar, no less restrictive alternatives were utilized, considered or even proposed." Record 1070–1071 (emphasis in original).

The Nevada Supreme Court affirmed Riggins' convictions and death sentence. 107 Nev. 178, 808 P. 2d 535 (1991). With respect to administration of Mellaril, the court held that expert testimony presented at trial "was sufficient to inform the jury of the effect of the Mellaril on Riggins' demeanor and testimony." *Id.*, at 181, 808 P. 2d, at 538. Thus, although Riggins' demeanor was relevant to his insanity defense, the court held that denial of the defense's motion to terminate medication was neither an abuse of discretion nor a violation of Riggins' trial rights. In a concurring opinion, Justice Rose suggested that the District Court should have determined whether administration of Mellaril during trial was "absolutely necessary" by ordering a pretrial suspension of medication. *Id.*, at 185, 808 P. 2d, at 540 (concurring opinion). Justice Springer dissented, arguing that antipsychotic drugs may never be forced on a criminal defendant solely to allow prosecution. *Id.*, at 186, 808 P. 2d, at 541.

We granted certiorari, 502 U. S. 807 (1991), to decide whether forced administration of antipsychotic medication

during trial violated rights guaranteed by the Sixth and Fourteenth Amendments.

II

The record in this case narrowly defines the issues before us. The parties have indicated that once the District Court denied Riggins' motion to terminate use of Mellaril, subsequent administration of the drug was involuntary. See, *e. g.*, Brief for Petitioner 6 (medication was "forced"); Brief for Respondent 14, 22, 28 (describing medication as "unwanted," "over objection," and "compelled"). This understanding accords with the determination of the Nevada Supreme Court. See 107 Nev., at 181; 808 P. 2d, at 537 (describing medication as "involuntary" and "forced"). Given the parties' positions on this point and the absence of any record evidence to the contrary, we adhere to the understanding of the State Supreme Court.

We also presume that administration of Mellaril was medically appropriate. Although defense counsel stressed that Riggins received a very high dose of the drug, at no point did he suggest to the Nevada courts that administration of Mellaril was medically improper treatment for his client.

Finally, the record is dispositive with respect to Riggins' Eighth Amendment claim that administration of Mellaril denied him an opportunity to show jurors his true mental condition at the sentencing hearing. Because this argument was presented neither to the Nevada Supreme Court nor in Riggins' petition for certiorari, we do not address it here.

With these considerations in mind, we turn to Riggins' core contention that involuntary administration of Mellaril denied him "a full and fair trial." Pet. for Cert. i. Our discussion in *Washington* v. *Harper*, 494 U. S. 210 (1990), provides useful background for evaluating this claim. In *Harper*, a prison inmate alleged that the State of Washington and various individuals violated his right to due process by giving him Mellaril and other antipsychotic drugs against his will. Although the inmate did not prevail, we agreed that

his interest in avoiding involuntary administration of antipsychotic drugs was protected under the Fourteenth Amendment's Due Process Clause. "The forcible injection of medication into a nonconsenting person's body," we said, "represents a substantial interference with that person's liberty." *Id.*, at 229. In the case of antipsychotic drugs like Mellaril, that interference is particularly severe:

> "The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. . . . [T]he proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe." *Id.*, at 229–230 (citations omitted).

Taking account of the unique circumstances of penal confinement, however, we determined that due process allows a

mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.*, at 227.

Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial. See *Bell* v. *Wolfish*, 441 U. S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners"); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349 (1987) ("[P]rison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). Thus, once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug.

Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. See *Harper*, *supra*, at 225–226; cf. *Addington* v. *Texas*, 441 U. S. 418 (1979) (Due Process Clause allows civil commitment of individuals shown by clear and convincing evidence to be mentally ill and dangerous). Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means. See *Illinois* v. *Allen*, 397 U. S. 337, 347

(1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace"). We note that during the July 14 hearing Riggins did not contend that he had the right to be tried without Mellaril if its discontinuation rendered him incompetent. See Record 424–425, 496, 500. The question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us.

Contrary to the dissent's understanding, we do not "adopt a standard of strict scrutiny." *Post*, at 156. We have no occasion to finally prescribe such substantive standards as mentioned above, since the District Court allowed administration of Mellaril to continue without making *any* determination of the need for this course or *any* findings about reasonable alternatives. The court's laconic order denying Riggins' motion did not adopt the State's view, which was that continued administration of Mellaril was required to ensure that the defendant could be tried; in fact, the hearing testimony casts considerable doubt on that argument. See *supra*, at 130–131. Nor did the order indicate a finding that safety considerations or other compelling concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs.

Were we to divine the District Court's logic from the hearing transcript, we would have to conclude that the court simply weighed the risk that the defense would be prejudiced by changes in Riggins' outward appearance against the chance that Riggins would become incompetent if taken off Mellaril, and struck the balance in favor of involuntary medication. See Record 502 ("[T]hat he was nervous and so forth . . . can all be brought out [through expert testimony]. And when you start weighing the consequences of taking him off his medication and possibly have him revert into an incompetent situation, I don't think that that is a good exper-

iment"). The court did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs.

This error may well have impaired the constitutionally protected trial rights Riggins invokes. At the hearing to consider terminating medication, Dr. O'Gorman suggested that the dosage administered to Riggins was within the toxic range, *id.*, at 483, and could make him "uptight," *id.*, at 484. Dr. Master testified that a patient taking 800 milligrams of Mellaril each day might suffer from drowsiness or confusion. *Id.*, at 416. Cf. Brief for American Psychiatric Association as *Amicus Curiae* 10–11 ("[I]n extreme cases, the sedation-like effect [of antipsychotic medication] may be severe enough (akinesia) to affect thought processes"). It is clearly possible that such side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.

Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. See *post*, at 149–150. Like the consequences of compelling a defendant to wear prison clothing, see *Estelle* v. *Williams*, 425 U. S. 501, 504–505 (1976), or of binding and gagging an accused during trial, see *Allen*, *supra*, at 344, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired due to the administration of Mellaril.

We also are persuaded that allowing Riggins to present expert testimony about the effect of Mellaril on his de-

meanor did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril. Even if (as the dissent argues, *post*, at 147–149) the Nevada Supreme Court was right that expert testimony allowed jurors to assess Riggins' demeanor fairly, an unacceptable risk of prejudice remained. See 107 Nev., at 181, 808 P. 2d, at 537–538.

To be sure, trial prejudice can sometimes be justified by an essential state interest. See *Holbrook* v. *Flynn*, 475 U. S. 560, 568–569 (1986); *Allen*, *supra*, at 344 (binding and gagging the accused permissible only in extreme situations where it is the "fairest and most reasonable way" to control a disruptive defendant); see also *Williams*, *supra*, at 505 (compelling defendants to wear prison clothing at trial furthers no essential state policy). Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.

The judgment of the Nevada Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

The medical and pharmacological data in the *amicus* briefs and other sources indicate that involuntary medication with antipsychotic drugs poses a serious threat to a defendant's right to a fair trial. In the case before us, there was no hearing or well-developed record on the point, and the whole subject of treating incompetence to stand trial by drug medication is somewhat new to the law, if not to medicine. On the sparse record before us, we cannot give full consideration to the issue. I file this separate opinion, however, to express

my view that absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial, and to express doubt that the showing can be made in most cases, given our present understanding of the properties of these drugs.

At the outset, I express full agreement with the Court's conclusion that one who was medicated against his will in order to stand trial may challenge his conviction. When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence. See *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) (suppression by the prosecution of material evidence favorable to the accused violates due process); *Arizona* v. *Youngblood*, 488 U. S. 51, 58 (1988) (bad-faith failure to preserve potentially useful evidence constitutes a due process violation). I cannot accept the premise of JUSTICE THOMAS' dissent that the involuntary medication order comprises some separate procedure, unrelated to the trial and foreclosed from inquiry or review in the criminal proceeding itself. To the contrary, the allegations pertain to the State's interference with the trial. Thus, review in the criminal proceeding is appropriate.

I also agree with the majority that the State has a legitimate interest in attempting to restore the competence of otherwise incompetent defendants. Its interest derives from the State's right to bring an accused to trial and from our holding in *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966), that conviction of an incompetent defendant violates due process. Unless a defendant is competent, the State cannot put him on trial. Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of coun-

sel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. *Drope* v. *Missouri*, 420 U. S. 162, 171–172 (1975). Although the majority is correct that this case does not require us to address the question whether a defendant may waive his right to be tried while competent, in my view a general rule permitting waiver would not withstand scrutiny under the Due Process Clause, given our holdings in *Pate* and *Drope*. A defendant's waiver of the right to be tried while competent would cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial.

The question is whether the State's interest in conducting the trial allows it to ensure the defendant's competence by involuntary medication, assuming of course there is a sound medical basis for the treatment. The Court's opinion will require further proceedings on remand, but there seems to be little discussion about what is to be considered. The Court's failure to address these issues is understandable in some respects, for it was not the subject of briefing or argument; but to underscore my reservations about the propriety of involuntary medication for the purpose of rendering the defendant competent, and to explain what I think ought to be express qualifications of the Court's opinion, some discussion of the point is required.

This is not a case like *Washington* v. *Harper*, 494 U. S. 210 (1990), in which the purpose of the involuntary medication was to ensure that the incarcerated person ceased to be a physical danger to himself or others. The inquiry in that context is both objective and manageable. Here the purpose of the medication is not merely to treat a person with grave psychiatric disorders and enable that person to function and behave in a way not dangerous to himself or others, but rather to render the person competent to stand trial. It is the last part of the State's objective, medicating the person for the purpose of bringing him to trial, that causes most

serious concern. If the only question were whether some bare level of functional competence can be induced, that would be a grave matter in itself, but here there are even more far reaching concerns. The avowed purpose of the medication is not functional competence, but competence to stand trial. In my view elementary protections against state intrusion require the State in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the State can make that showing. Indeed, the inquiry itself is elusive, for it assumes some baseline of normality that experts may have some difficulty in establishing for a particular defendant, if they can establish it at all. These uncertainties serve to underscore the difficult terrain the State must traverse when it enters this domain.

To make these concerns concrete, the effects of antipsychotic drugs must be addressed. First introduced in the 1950's, antipsychotic drugs such as Mellaril have wide acceptance in the psychiatric community as an effective treatment for psychotic thought disorders. See American Psychiatric Press Textbook of Psychiatry 770–774 (J. Talbott, R. Hales, & S. Yodofsky eds. 1988) (Textbook of Psychiatry); Brief for American Psychiatric Association as *Amicus Curiae* 6–7. The medications restore normal thought processes by clearing hallucinations and delusions. Textbook of Psychiatry 774. See also Brief for American Psychiatric Association as *Amicus Curiae* 9 ("The mental health produced by antipsychotic medication is no different from, no more inauthentic or alien to the patient than, the physical health produced by other medications, such as penicillin for pneumonia"). For many patients, no effective alternative exists for treatment of their illnesses. *Id.*, at 7, and n. 3.

Although these drugs have changed the lives of psychiatric patients, they can have unwanted side effects. We documented some of the more serious side effects in *Washington* v. *Harper*, *supra*, at 229–230, and they are mentioned again in the majority opinion. More relevant to this case are side effects that, it appears, can compromise the right of a medicated criminal defendant to receive a fair trial. The drugs can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel.

It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. *Taylor* v. *United States*, 414 U. S. 17, 19 (1973) *(per curiam)*. At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility and persuasiveness, and on the degree to which he evokes sympathy. The defendant's demeanor may also be relevant to his confrontation rights. See *Coy* v. *Iowa*, 487 U. S. 1012, 1016–1020 (1988) (emphasizing the importance of the face-to-face encounter between the accused and the accuser).

The side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense. Serious due process concerns are implicated when the State manipulates the evidence in this way. The defendant may be restless and unable to sit still. Brief for American Psychiatric Association as *Amicus Curiae* 10. The drugs can induce

a condition called parkinsonism, which, like Parkinson's disease, is characterized by tremor of the limbs, diminished range of facial expression, or slowed functions, such as speech. *Ibid.* Some of the side effects are more subtle. Antipsychotic drugs such as Mellaril can have a "sedation-like effect" that in severe cases may affect thought processes. *Ibid.* At trial, Dr. Jurasky testified that Mellaril has "a tranquilizer effect." Record 752. See also *ibid.* ("If you are dealing with someone very sick then you may prescribe up to 800 milligrams which is the dose he had been taking which is very, very high. I mean you can tranquilize an elephant with 800 milligrams"). Dr. Jurasky listed the following side effects of large doses of Mellaril: "Drowsiness, constipation, perhaps lack of alertness, changes in blood pressure. . . . Depression of the psychomotor functions. If you take a lot of it you become stoned for all practical purposes and can barely function." *Id.*, at 753.

These potential side effects would be disturbing for any patient; but when the patient is a criminal defendant who is going to stand trial, the documented probability of side effects seems to me to render involuntary administration of the drugs by prosecuting officials unacceptable absent a showing by the State that the side effects will not alter the defendant's reactions or diminish his capacity to assist counsel. As the American Psychiatric Association points out:

> "By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. . . . That such effects may be subtle does not make them any less real or potentially influential." Brief for American Psychiatric Association as *Amicus Curiae* 13.

As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react

and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies. See Geimer & Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 51–53 (1987–1988).

Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. *Massiah* v. *United States*, 377 U. S. 201 (1964); *Geders* v. *United States*, 425 U. S. 80 (1976) (trial court order directing defendant not to consult with his lawyer during an overnight recess held to deprive him of the effective assistance of counsel). The defendant must be able to provide needed information to his lawyer and to participate in the making of decisions on his own behalf. The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. The State interferes with this relation when it administers a drug to dull cognition. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 42 ("[T]he chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial").

It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system. *In re Oliver*, 333 U. S. 257, 273 (1948). We have found the right implicit as well in the Com-

pulsory Process Clause of the Sixth Amendment. *Rock* v. *Arkansas*, 483 U. S. 44 (1987). In *Rock*, we held that a state rule excluding all testimony aided or refreshed by hypnosis violated the defendant's constitutional right to take the stand in her own defense. We observed that barring the testimony would contradict not only the right of the accused to conduct her own defense, but also her right to make this defense in person: "'It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor."'" *Id.*, at 52, quoting *Faretta* v. *California*, 422 U. S. 806, 819 (1975). We gave further recognition to the right of the accused to testify in his or her own words, and noted that this in turn was related to the Fifth Amendment choice to speak "in the unfettered exercise of his own will." *Rock*, *supra*, at 53. In my view medication of the type here prescribed may be for the very purpose of imposing constraints on the defendant's own will, and for that reason its legitimacy is put in grave doubt.

If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process. The state of our knowledge of antipsychotic drugs and their side effects is evolving and may one day produce effective drugs that have only minimal side effects. Until that day comes, we can permit their use only when the State can show that involuntary treatment does not cause alterations raising the concerns enumerated in this separate opinion.

With these observations, I concur in the judgment reversing the conviction.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins except as to Part II–A, dissenting.

Petitioner David Edward Riggins killed Paul William Wade by stabbing him 32 times with a knife. He then took cash, drugs, and other items from Wade's home. A Nevada jury convicted Riggins of first-degree murder and robbery with a deadly weapon and sentenced him to death. The Nevada Supreme Court affirmed. 107 Nev. 178, 808 P. 2d 535 (1991). This Court reverses the conviction, holding that Nevada unconstitutionally deprived Riggins of his liberty interest in avoiding unwanted medication by compelling him to take an antipsychotic drug. I respectfully dissent.

The Court's opinion, in my view, conflates two distinct questions: whether Riggins had a full and fair criminal trial and whether Nevada improperly forced Riggins to take medication. In this criminal case, Riggins is asking, and may ask, only for the reversal of his conviction and sentence. He is not seeking, and may not seek, an injunction to terminate his medical treatment or damages for an infringement of his personal rights. I agree with the positions of the majority and concurring opinions in the Nevada Supreme Court: Even if the State truly forced Riggins to take medication, and even if this medication deprived Riggins of a protected liberty interest in a manner actionable in a different legal proceeding, Riggins nonetheless had the fundamentally fair criminal trial required by the Constitution. I therefore would affirm his conviction.

I

Riggins contended in the Nevada Supreme Court that he did not have a "'full and fair' trial" for two reasons, the first relating to exclusion of evidence of his mental condition and the second concerning his ability to assist in his defense. Record 1018. To the extent that Riggins' arguments below involved federal constitutional issues, I believe that the Nevada Supreme Court correctly rejected them.

A

Riggins first argued that the trial court improperly prevented him from presenting relevant evidence of his demeanor. As the Court notes, Riggins suffers from a mental illness and raised insanity as a defense at trial. When Riggins killed Wade, he was not using any antipsychotic medication. During his trial, however, Riggins was taking large doses of the antipsychotic drug Mellaril. Riggins believed that this drug would make his appearance at trial different from his appearance when he attacked Wade and that this difference might cause the jury to misjudge his sanity. To show his mental condition as it existed at the time of the crime, Riggins requested permission to appear before the jury in an unmedicated state. App. 20–24, 42–47. The trial court denied the request, and the Nevada Supreme Court affirmed.

This Court has no power to decide questions concerning the admissibility of evidence under Nevada law. *Estelle* v. *McGuire*, 502 U. S. 62, 67–68 (1991). We therefore may conduct only a limited review of a Nevada court's decision to exclude a particular form of demeanor evidence. Except in cases involving a violation of a specific constitutional provision such as the Confrontation Clause, see, *e. g.*, *Ohio* v. *Roberts*, 448 U. S. 56 (1980), this Court may not reverse a state "trial judge's action in the admission of evidence" unless the evidentiary ruling "so infuse[s] the trial with unfairness as to deny due process of law." *Lisenba* v. *California*, 314 U. S. 219, 228 (1941). See also *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983); *Burgett* v. *Texas*, 389 U. S. 109, 113–114 (1967). In this case, I see no basis for concluding that Riggins had less than a full and fair trial.

The Court declines to decide whether Mellaril actually affected Riggins' appearance. On the basis of some pretrial psychiatric testimony it speculates only that Riggins might have looked less uptight, drowsy, or confused if he had not taken the drug. *Ante*, at 137. Other evidence casts doubt

on this possibility. At least one psychiatrist believed that a jury would not "be able to notice whether or not [Riggins] was on Mellaril as compared to the period of the time when he was not medicated by that drug." Record 445. Yet, even if Mellaril noticeably affected Riggins' demeanor, the Court fails to explain why the medication's effects rendered Riggins' trial fundamentally unfair.

The trial court offered Riggins the opportunity to prove his mental condition as it existed at the time of the crime through testimony instead of his appearance in court in an unmedicated condition. Riggins took advantage of this offer by explaining to the jury the history of his mental health, his usage of Mellaril, and the possible effects of Mellaril on his demeanor. *Id.*, at 739–740. Riggins also called Dr. Jack A. Jurasky, a psychiatrist, who testified about Riggins' condition after his arrest and his likely mental state at the time of the crime. *Id.*, at 747–748. Dr. Jurasky also explained Riggins' use of Mellaril and how it might be affecting him. *Id.*, at 752–753, 760–761.

The Nevada Supreme Court concluded that this "testimony was sufficient to inform the jury of the effect of the Mellaril on Riggins' demeanor and testimony." 107 Nev., at 181, 808 P. 2d, at 538. Its analysis comports with that of other state courts that also have held that expert testimony may suffice to clarify the effects of an antipsychotic drug on a defendant's apparent demeanor. See *State* v. *Law*, 270 S. C. 664, 673, 244 S. E. 2d 302, 306 (1978); *State* v. *Jojola*, 89 N. M. 489, 493, 553 P. 2d 1296, 1300 (1976). Cf. *In re Pray*, 133 Vt. 253, 257–258, 336 A. 2d 174, 177 (1975) (reversing a conviction because no expert testimony explained how antipsychotic medicine affected the defendant's appearance). Having reviewed the record as a whole, I see no reason to disturb the conclusion of the Nevada Supreme Court. On the facts of this case, Riggins' inability to introduce evidence of his mental condition as he desired did not render his trial fundamentally unfair. See *Rock* v. *Arkansas*, 483

U. S. 44, 55, n. 11 (1987); *id.*, at 64–65 (REHNQUIST, C. J., dissenting).

B

Riggins also argued in the Nevada Supreme Court, although not in his briefs to this Court, that he did not have a "'full and fair' trial" because Mellaril had side effects that interfered with his ability to participate in his defense. Record 1018. He alleged, in particular, that the drug tended to limit his powers of perception. The Court accepts this contention, stating: "It is clearly *possible* that such side effects had an impact upon . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Ante*, at 137 (emphasis added). I disagree. We cannot conclude that Riggins had less than a full and fair trial merely because of the possibility that Mellaril had side effects.

All criminal defendants have a right to a full and fair trial, and a violation of this right may occur if a State tries a defendant who lacks a certain ability to comprehend or participate in the proceedings. We have said that "the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial," *Spencer* v. *Texas*, 385 U. S. 554, 563–564 (1967), and have made clear that "conviction of an accused person while he is legally incompetent violates due process," *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966).

Riggins has no claim of legal incompetence in this case. The trial court specifically found him competent while he was taking Mellaril under a statute requiring him to have "sufficient mentality to be able to understand the nature of the criminal charges against him, and . . . to aid and assist his counsel in the defense interposed upon the trial." Nev. Rev. Stat. § 178.400(2) (1989). Riggins does not assert that due process imposes a higher standard.

The record does not reveal any other form of unfairness relating to the purported side effects of Mellaril. Riggins has failed to allege specific facts to support his claim that he

could not participate effectively in his defense. He has not stated how he would have directed his counsel to examine or cross-examine witnesses differently. He has not identified any testimony or instructions that he did not understand. The record, moreover, does not even support his assertion that Mellaril made him worse off. As Justice Rose noted in his concurring opinion below: "Two psychiatrists who had prescribed Mellaril for Riggins, Dr. Quass and Dr. O'Gorman, testified that they believed it was helpful to him. Additional psychiatric testimony established that Mellaril may have increased Riggins' cognitive ability . . . ." 107 Nev., at 185, 808 P. 2d, at 540. See also *State* v. *Hayes*, 118 N. H. 458, 461, 389 A. 2d 1379, 1381 (1978) (holding a defendant's perception adequate because "[a]ll the expert evidence support[ed] the conclusion that the medication ha[d] a beneficial effect on the defendant's ability to function").[1] Riggins' competence, moreover, tends to confirm that he had a fair trial. See *State* v. *Jojola*, *supra*, at 492, 553 P. 2d, at 1299 (presuming, absent other evidence, that the side effects of an antipsychotic drug did not render a competent defendant unable to participate fully in his trial). I thus see no basis for reversing the Nevada Supreme Court.

II

Riggins also argues for reversal on the basis of our holding in *Washington* v. *Harper*, 494 U. S. 210, 221 (1990), that the Due Process Clause protects a substantive "liberty interest" in avoiding unwanted medication. Riggins asserts that Nevada unconstitutionally deprived him of this liberty interest by forcing him to take Mellaril. The Court agrees, ruling

[1] We previously have noted that "'[p]sychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia.'" *Washington* v. *Harper*, 494 U. S. 210, 226, n. 9 (1990) (quoting Brief for American Psychiatric Association et al. as *Amici Curiae*, O. T. 1989, No. 88–599, pp. 10–11).

that "the Nevada courts failed to make findings sufficient to support forced administration of the drug" in this case. *Ante*, at 129. I consider reversal on this basis improper.

A

Riggins may not complain about a deprivation of the liberty interest that we recognized in *Harper* because the record does not support his version of the facts. Shortly after his arrest, as the Court notes, Riggins told a psychiatrist at his jail that he was hearing voices and could not sleep. The psychiatrist prescribed Mellaril. When the prescription did not eliminate the problem, Riggins sought further treatment and the psychiatrist increased the dosage. Riggins thus began taking the drug voluntarily. *Ante*, at 129.

The Court concludes that the medication became involuntary when the trial court denied Riggins' motion for permission not to take the drug during the trial. *Ante*, at 133. I disagree. Although the court denied Riggins' motion, it did not order him to take any medication.[2] Moreover, even though Riggins *alleges* that the *state physicians* forced him to take the medication after the court's order, the record contains no finding of fact with respect to this allegation. The Court admits that it merely assumes that the physicians drugged him, and attempts to justify its assumption by observing that the Nevada Supreme Court also assumed that involuntary medication occurred. *Ibid.* The Nevada Supreme Court, however, may have made its assumption for the purpose of argument; the assumption, in its view, did

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[2] Riggins' counsel confirmed this interpretation of the order at oral argument:

"QUESTION: . . . [D]id the court ever go further than saying I will not order the State to stop administering the medication? . . . It simply said . . . I won't intervene and enjoin the administration of this medication[.]

"MR. YAMPOLSKY: Yes . . . .

"QUESTION: So if [Riggins] had then said, well, I'm not going to take it, he wouldn't be in violation of the court order? . . .

"Mr. YAMPOLSKY: Apparently not." Tr. of Oral Arg. 10.

not change the result of the case. The Court cannot make the same assumption if it requires reversal of Riggins' conviction.

Riggins also cannot complain about a violation of *Harper* because he did not argue below for reversal of his conviction on the ground that Nevada had deprived him of a liberty interest. Riggins consistently maintained in the Nevada courts that he did not have a "full and fair trial" because the medication deprived him of the opportunity to present his demeanor to the jury and to participate in his defense. App. 20–24 (trial court motion); *id.*, at 42–47 (trial court reply); Record 1018–1021 (appellate brief); *id.*, at 1068–1071 (appellate reply brief). As counsel for Nevada put it at oral argument: "The way this issue was initially presented to the trial court was really a question of trial strategy. There was never an indication in this case that Mr. Riggins was a Harper-type defendant who did not want to be medicated." Tr. of Oral Arg. 23.[3]

Because the claims that Riggins raised below have no merit, Riggins has altered his theory of the case. The Court, therefore, should not condemn the Nevada courts because they "did not acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs." *Ante*, at 137. The Nevada courts had no reason to consider an argument that Riggins did not make. We have said quite recently that "[i]n reviewing the judgments of state courts under the jurisdictional grant of 28 U. S. C. § 1257, the Court has, with very rare exceptions, refused to consider petition-

[3] Riggins noted in his reply brief before the Nevada Supreme Court that the courts in *United States* v. *Bryant*, 670 F. Supp. 840, 843 (Minn. 1987), and *Bee* v. *Greaves*, 744 F. 2d 1387 (CA10 1984), had recognized a personal liberty interest in avoiding unwanted medication. Record 1070–1071. Yet, Riggins never asked for reversal because of a deprivation of this interest. He argued for reversal in that brief only on grounds that the medication "violated [his] right to a 'full and fair' trial because it denied him the ability to assist in his defense, and prejudiced his demeanor, attitude, and appearance to the jury." *Id.*, at 1068.

ers' claims that were not raised or addressed below." *Yee* v. *Escondido*, 503 U. S. 519, 533 (1992). Although "we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts," *ibid.*, the Court does not attempt to justify its departure here.

Finally, we did not grant certiorari to determine whether the Nevada courts had made the findings required by *Harper* to support forced administration of a drug. We took this case to decide "[w]hether forced medication during trial violates a defendant's constitutional right to a full and fair trial." Pet. for Cert. The Court declines to answer this question one way or the other, stating only that a violation of *Harper* "may well have impaired the constitutionally protected trial rights Riggins invokes." *Ante*, at 137. As we have stated, "we ordinarily do not consider questions outside those presented in the petition for certiorari." *Yee* v. *Escondido*, *supra*, at 535. I believe that we should refuse to consider Riggins' *Harper* argument.

B

The *Harper* issue, in any event, does not warrant reversal of Riggins' conviction. The Court correctly states that Riggins, as a detainee awaiting trial, had at least the same liberty interest in avoiding unwanted medication that the inmate had in *Harper*. This case, however, differs from *Harper* in a very significant respect. When the inmate in *Harper* complained that physicians were drugging him against his will, he sought damages and an injunction against future medication in a civil action under 42 U. S. C. § 1983. See 494 U. S., at 217. Although Riggins also complains of forced medication, he is seeking a reversal of his criminal conviction. I would not expand *Harper* to include this remedy.

We have held that plaintiffs may receive civil remedies for all manner of constitutional violations under § 1983. See

Dennis v. *Higgins*, 498 U. S. 439, 443–451 (1991). This Court, however, has reversed criminal convictions only on the basis of two kinds of constitutional deprivations: those "which occu[r] during the presentation of the case" to the trier of fact, and those which cause a "structural defect affecting the framework" of the trial. *Arizona* v. *Fulminante*, 499 U. S. 279, 307, 310 (1991). The Court does not reveal why it considers a deprivation of a liberty interest in avoiding unwanted medication to fall into either category of reversible error. Even if Nevada failed to make the findings necessary to support forced administration of Mellaril, this failure, without more, would not constitute a trial error or a flaw in the trial mechanism. See 107 Nev., at 185, 808 P. 2d, at 540 (Rose, J., concurring). Although Riggins might be entitled to other remedies, he has no right to have his conviction reversed.[4]

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[4] A State, however, might violate a defendant's due process right to a fundamentally fair trial if its administration of medication were to *diminish* substantially the defendant's mental faculties during the trial, even if he were not thereby rendered incompetent. See 3 E. Coke, Institutes *34 (1797) ("If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"); Resolutions of the Judges upon the Case of the Regicides, Kelyng's Report of Divers Cases in Pleas of the Crown 10 (1708) (Old Bailey 1660) ("It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defense, be their Crime never so great"), reprinted in 5 How. St. Tr. 971, 979–980 (1816); *Trial of Christopher Layer*, 16 How. St. Tr. 94, 100 (1812) [K. B. 1722] ("[T]he authority is that [the defendant] is not to be 'in vinculis' during his trial, but should be so far free, that he should have the use of his reason, and all advantages to clear his innocence"); see also *State* v. *Williams*, 18 Wash. 47, 49–51, 50 P. 580, 581 (1897) ("'[T]he condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties'") (quoting *State* v. *Kring*, 64 Mo. 591 (1877)). Riggins has not made (much less proved) any such allegation in this Court; indeed, the record indicates that Riggins' mental capacity was *enhanced* by his administration of Mellaril.

We applied a similar analysis in *Estelle* v. *Williams*, 425 U. S. 501 (1976). In that case, a prisoner challenged his conviction on grounds that the State had required him to wear prison garb before the jury. In reviewing the challenge, we did not ask whether the State had violated some personal right of the defendant to select his attire. Instead, we considered only whether the prison clothing had denied him a "fair trial" by making his appearance less favorable to the jury. *Id.*, at 503. Although we ultimately declined to reach the merits because the prisoner had waived the issue at trial, *id.*, at 512, we observed that lower courts had held that "a showing of actual prejudice must be made by a defendant seeking to have his conviction overturned on this ground," *id.*, at 504, n. 1. In my view, just as the validity of the conviction in *Estelle* v. *Williams* would depend on whether the prisoner had a fair trial, so does the validity of Riggins' conviction.

The need for requiring actual unfairness in this case (either in the form of a structural defect or an error in the presentation of evidence) becomes apparent when one considers how the Court might apply its decision to other cases. A State could violate *Harper* by forcibly administering *any* kind of medication to a criminal defendant. Yet, the Court surely would not reverse a criminal conviction for a *Harper* violation involving medications such as penicillin or aspirin. Perhaps Mellaril, in general, has a greater likelihood of affecting a person's appearance and powers of perceptions than these substances. As noted above, however, we have no indication in this case, considering the record as a whole, that Mellaril unfairly prejudiced Riggins.

I do not mean in any way to undervalue the importance of a person's liberty interest in avoiding forced medication or to suggest that States may drug detainees at their whim. Under *Harper*, detainees have an interest in avoiding unwanted medication that the States must respect. In appropriate instances, detainees may seek damages or injunctions

against further medication in civil actions either under § 1983, as in *Harper*, or under state law. Yet, when this Court reviews a state-court criminal conviction of a defendant who has taken medication, it cannot undo any violation that already has occurred or punish those responsible. It may determine only whether the defendant received a proper trial, free of the kinds of reversible errors that we have recognized. Because Riggins had a full and fair trial in this case, I would affirm the Nevada Supreme Court.

C

For the foregoing reasons, I find it unnecessary to address the precise standards governing the forced administration of drugs to persons such as Riggins. Whether or not Nevada violated these standards, I would affirm Riggins' conviction. I note, however, that the Court's discussion of these standards poses troubling questions. Although the Court purports to rely on *Washington* v. *Harper*, the standards that it applies in this case differ in several respects.

The Court today, for instance, appears to adopt a standard of strict scrutiny. It specifically faults the trial court for failing to find either that the "continued administration of Mellaril was *required* to ensure that the defendant could be tried," *ante*, at 136 (emphasis added), or that "other *compelling* concerns outweighed Riggins' interest in freedom from unwanted antipsychotic drugs," *ibid.* (emphasis added). We specifically rejected this high standard of review in *Harper*. In that case, the Washington Supreme Court had held that state physicians could not administer medication to a prisoner without showing that it "was both necessary and effective for furthering a compelling state interest." 494 U. S., at 218. We reversed, holding that the state court "erred in refusing to apply the standard of reasonableness." *Id.*, at 223.

The Court today also departs from *Harper* when it says that the Nevada Supreme Court erred by not "considering

less intrusive alternatives." *Ante*, at 135. The Court presumably believes that Nevada could have treated Riggins with smaller doses of Mellaril or with other kinds of therapies. In *Harper*, however, we imposed no such requirement. In fact, we specifically ruled that "[t]he alternative means proffered by [the prisoner] for accommodating his interest in rejecting the forced administration of antipsychotic drugs do not demonstrate the invalidity of the State's policy." 494 U. S., at 226.

This case differs from *Harper* because it involves a pretrial detainee and not a convicted prisoner. The standards for forcibly medicating inmates well may differ from those for persons awaiting trial. The Court, however, does not rely on this distinction in departing from *Harper;* instead, it purports to be applying *Harper* to detainees. *Ante*, at 135. Either the Court is seeking to change the *Harper* standards or it is adopting different standards for detainees without stating its reasons. I cannot accept either interpretation of the Court's opinion. For all of these reasons, I respectfully dissent.

Syllabus

WYATT *v.* COLE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91–126. Argued January 14, 1992—Decided May 18, 1992

With the assistance of respondent Robbins, an attorney, respondent Cole filed a complaint under the Mississippi replevin statute against his partner, petitioner Wyatt. After Cole refused to comply with a state court order to return to Wyatt property seized under the statute, Wyatt brought suit in the Federal District Court under 42 U. S. C. § 1983, challenging the state statute's constitutionality and seeking injunctive relief and damages. Among other things, the court held the statute unconstitutional and assumed that Cole was subject to liability under *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, in which this Court ruled that private defendants invoking state replevin, garnishment, and attachment statutes later declared unconstitutional act under color of state law for § 1983 liability purposes. The court also intimated that, but did not decide whether, Robbins was subject to § 1983 liability. However, *Lugar* had left open the question whether private defendants are entitled to qualified immunity from suit in such cases, see *id.*, at 942, n. 23, and the District Court held that respondents were entitled to qualified immunity at least for conduct arising prior to the replevin statute's invalidation. The Court of Appeals affirmed the grant of qualified immunity to respondents without revisiting the question of their § 1983 liability.

Held:

1. Qualified immunity from suit, as enunciated by this Court with respect to government officials, is not available to private defendants charged with § 1983 liability for invoking state replevin, garnishment, or attachment statutes. Immunity for private defendants was not so firmly rooted in the common law and was not supported by such strong policy reasons as to create an inference that Congress meant to incorporate it into § 1983. See, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622, 637. Even if there were sufficient common law support to conclude that private defendants should be entitled to a good faith and/or probable cause defense to suits for unjustified harm arising out of the misuse of governmental processes, that would still not entitle respondents to what they obtained in the courts below: the type of objectively determined, immediately appealable, qualified *immunity* from suit accorded government officials under, *e. g.*, *Harlow* v. *Fitzgerald*, 457 U. S.

800, and *Mitchell* v. *Forsyth*, 472 U. S. 511. Moreover, the policy concerns mandating qualified immunity for officials in such cases—the need to preserve the officials' ability to perform their discretionary functions and to ensure that talented candidates not be deterred by the threat of damages suits from entering public service—are not applicable to private parties. Although it may be that private defendants faced with § 1983 liability under *Lugar*, *supra*, could be entitled to an affirmative good faith defense, or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens, those issues are neither before the Court nor decided here. Pp. 163–169.

2. On remand, it must be determined, at least, whether respondents, in invoking the replevin statute, acted under color of state law within the meaning of *Lugar*, *supra*. P. 169.

928 F. 2d 718, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 169. REHNQUIST, C. J., filed a dissenting opinion, in which SOUTER and THOMAS, JJ., joined, *post*, p. 175.

Jim Waide argued the cause for petitioner. With him on the briefs were *Douglas M. Magee* and *Alan B. Morrison.*

Joseph Leray McNamara argued the cause and filed a brief for respondents.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), we left open the question whether private defendants charged with 42 U. S. C. § 1983 liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit. 457 U. S., at 942, n. 23. We now hold that they are not.

I

This dispute arises out of a soured cattle partnership. In July 1986, respondent Bill Cole sought to dissolve his partnership with petitioner Howard Wyatt. When no agreement could be reached, Cole, with the assistance of an

attorney, respondent John Robbins II, filed a state court complaint in replevin against Wyatt, accompanied by a replevin bond of $18,000.

At that time, Mississippi law provided that an individual could obtain a court order for seizure of property possessed by another by posting a bond and swearing to a state court that the applicant was entitled to that property and that the adversary "wrongfully took and detain[ed] or wrongfully detain[ed]" the property. 1975 Miss. Gen. Laws, ch. 508, § 1. The statute gave the judge no discretion to deny a writ of replevin.

After Cole presented a complaint and bond, the court ordered the county sheriff to seize 24 head of cattle, a tractor, and certain other personal property from Wyatt. Several months later, after a postseizure hearing, the court dismissed Cole's complaint in replevin and ordered the property returned to Wyatt. When Cole refused to comply, Wyatt brought suit in Federal District Court, challenging the constitutionality of the statute and seeking injunctive relief and damages from respondents, the county sheriff, and the deputies involved in the seizure.

The District Court held that the statute's failure to afford judges discretion to deny writs of replevin violated due process. 710 F. Supp. 180, 183 (SD Miss. 1989).[1] It dismissed the suit against the government officials involved in the seizure on the ground that they were entitled to qualified immunity. App. 17–18. The court also held that Cole and Robbins, even if otherwise liable under § 1983, were entitled to qualified immunity from suit for conduct arising prior to the statute's invalidation. *Id.*, at 12–14. The Court of Appeals for the Fifth Circuit affirmed the District Court's grant of qualified immunity to the private defendants. 928 F. 2d 718 (1991).

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[1] The State amended the statute in 1990. Miss. Code Ann. § 11–37–101 (Supp. 1991).

We granted certiorari, 502 U. S. 807 (1991), to resolve a conflict among the Courts of Appeals over whether private defendants threatened with 42 U. S. C. § 1983 liability are, like certain government officials, entitled to qualified immunity from suit. Like the Fifth Circuit, the Eighth and Eleventh Circuits have determined that private defendants are entitled to qualified immunity. See *Buller* v. *Buechler*, 706 F. 2d 844, 850–852 (CA8 1983); *Jones* v. *Preuit & Mauldin*, 851 F. 2d 1321, 1323–1325 (CA11 1988) (en banc), vacated on other grounds, 489 U. S. 1002 (1989). The First and Ninth Circuits, however, have held that in certain circumstances, private parties acting under color of state law are not entitled to such an immunity. See *Downs* v. *Sawtelle*, 574 F. 2d 1, 15–16 (CA1), cert. denied, 439 U. S. 910 (1978); *Conner* v. *Santa Ana*, 897 F. 2d 1487, 1492, n. 9 (CA9), cert. denied, 498 U. S. 816 (1990); *Howerton* v. *Gabica*, 708 F. 2d 380, 385, n. 10 (CA9 1983). The Sixth Circuit has rejected qualified immunity for private defendants sued under § 1983 but has established a good faith defense. *Duncan* v. *Peck*, 844 F. 2d 1261 (1988).

II

Title 42 U. S. C. § 1983 provides a cause of action against "[e]very person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Carey* v. *Piphus*, 435 U. S. 247, 254–257 (1978).

In *Lugar* v. *Edmondson Oil Co.*, *supra*, the Court considered the scope of § 1983 liability in the context of garnishment, prejudgment attachment, and replevin statutes. In that case, the Court held that private parties who attached a debtor's assets pursuant to a state attachment statute were subject to § 1983 liability if the statute was constitutionally

infirm. Noting that our garnishment, prejudgment attachment, and replevin cases established that private use of state laws to secure property could constitute "state action" for purposes of the Fourteenth Amendment, *id.*, at 932–935, the Court held that private defendants invoking a state-created attachment statute act "under color of state law" within the meaning of § 1983 if their actions are "fairly attributable to the State," *id.*, at 937. This requirement is satisfied, the Court held, if two conditions are met. First, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid.* Second, the private party must have "acted together with or . . . obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State." *Ibid.* The Court found potential § 1983 liability in *Lugar* because the attachment scheme was created by the State and because the private defendants, in invoking the aid of state officials to attach the disputed property, were "willful participant[s] in joint activity with the State or its agents." *Id.*, at 941 (internal quotation marks omitted).

Citing *Lugar*, the District Court assumed that Cole, by invoking the state statute, had acted under color of state law within the meaning of § 1983, and was therefore liable for damages for the deprivation of Wyatt's due process rights. App. 12. With respect to Robbins, the court noted that while an action taken by an attorney in representing a client "does not normally constitute an act under color of state law, . . . an attorney is still a person who may conspire to act under color of state law in depriving another of secured rights." *Id.*, at 13. The court did not determine whether Robbins was liable, however, because it held that both Cole and Robbins were entitled to qualified immunity from suit at least for conduct prior to the statute's invalidation. *Id.*, at 13–14.

Although the Court of Appeals did not review whether, in the first instance, Cole and Robbins had acted under color of state law within the meaning of § 1983, it affirmed the District Court's grant of qualified immunity to respondents. In so doing, the Court of Appeals followed one of its prior cases, *Folsom Investment Co.* v. *Moore*, 681 F. 2d 1032 (CA5 1982), in which it held that "a § 1983 defendant who has invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional." *Id.*, at 1037. The court in *Folsom* based its holding on two grounds. First, it viewed the existence of a common law, probable cause defense to the torts of malicious prosecution and wrongful attachment as evidence that "Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process." *Id.*, at 1038. Although it acknowledged that a defense is not the same as an immunity, the court maintained that it could "transfor[m] a common law defense extant at the time of § 1983's passage into an immunity." *Ibid.* Second, the court held that while immunity for private parties is not derived from official immunity, it is based on "the important public interest in permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when they reasonably resort to a legal process later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal." *Id.*, at 1037. In defending the decision below, respondents advance both arguments put forward by the Court of Appeals in *Folsom*. Neither is availing.

III

Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976). Nonetheless, we have accorded certain government officials either absolute or qualified immu-

nity from suit if the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen* v. *City of Independence*, 445 U. S. 622, 637 (1980) (quoting *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967)). If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U. S. C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law. See *Tower* v. *Glover*, 467 U. S. 914, 920 (1984); *Imbler*, *supra*, at 421; *Pulliam* v. *Allen*, 466 U. S. 522, 529 (1984). Additionally, irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions. *Tower*, *supra*, at 920. See also *Imbler*, *supra*, at 424–429.

In determining whether there was an immunity at common law that Congress intended to incorporate in the Civil Rights Act, we look to the most closely analogous torts—in this case, malicious prosecution and abuse of process. At common law, these torts provided causes of action against private defendants for unjustified harm arising out of the misuse of governmental processes. 2 C. Addison, Law of Torts ¶ 852, and n. 2, ¶ 868, and n. 1 (1876); T. Cooley, Law of Torts 187–190 (1879); J. Bishop, Commentaries on Non-Contract Law §§ 228–250, pp. 91–103, § 490, p. 218 (1889).

Respondents do not contend that private parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution or abuse of process were entitled to absolute immunity. And with good reason; although public prosecutors and judges were accorded absolute immunity at common law, *Imbler* v. *Pachtman*, *supra*, at 421–424, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by

instigating a legal action. *Malley* v. *Briggs*, 475 U. S. 335, 340–341 (1986) ("In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause").

Nonetheless, respondents argue that at common law, private defendants could defeat a malicious prosecution or abuse of process action if they acted without malice and with probable cause, and that we should therefore infer that Congress did not intend to abrogate such defenses when it enacted the Civil Rights Act of 1871. We adopted similar reasoning in *Pierson* v. *Ray*, 386 U. S., at 555–557. There, we held that police officers sued for false arrest under § 1983 were entitled to the defense that they acted with probable cause and in good faith when making an arrest under a statute they reasonably believed was valid. We recognized this defense because peace officers were accorded protection from liability at common law if they arrested an individual in good faith, even if the innocence of such person were later established. *Ibid.*

The rationale we adopted in *Pierson* is of no avail to respondents here. Even if there were sufficient common law support to conclude that respondents, like the police officers in *Pierson*, should be entitled to a good faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

In *Harlow*, we altered the standard of qualified immunity adopted in our prior § 1983 cases because we recognized that "[t]he subjective element of the good-faith defense frequently [had] prove[d] incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.*, at 815–816. Because of the attendant harms to government effectiveness caused by lengthy judicial inquiry into subjective motivation, we concluded that "bare allegations of malice

should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.*, at 817–818. Accordingly, we held that government officials performing discretionary functions are shielded from "liability for civil damages insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. This wholly objective standard, we concluded, would "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Ibid.*

That *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987), was reinforced by our decision in *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). *Mitchell* held that *Harlow* established an "*immunity from suit* rather than a mere defense to liability," which, like an absolute immunity, "is effectively lost if a case is erroneously permitted to go to trial." 472 U. S., at 526 (emphasis supplied). Thus, we held in *Mitchell* that the denial of qualified immunity should be immediately appealable. *Id.*, at 530.

It is this type of objectively determined, immediately appealable immunity that respondents asserted below.[2] But,

[2] In arguing that respondents are entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the dissent mixes apples and oranges. Even if we were to agree with the dissent's proposition that elements a plaintiff was required to prove as part of her case in chief could somehow be construed as a "'defense,'" *post*, at 176, n. 1, and that this "defense" entitles private citizens to some protection from liability, we cannot agree that respondents are entitled to *immunity from suit* under *Harlow*. One could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action. Alternatively, if one accepts the dissent's characterization of the common law as establishing an affirmative "defense" for private defendants, then one could also conclude that private parties sued under § 1983 should likewise be entitled to

as our precedents make clear, the reasons for recognizing such an immunity were based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials. *Harlow, supra,* at 813; *Mitchell, supra,* at 526. Reviewing these concerns, we conclude that the rationales mandating qualified immunity for public officials are not applicable to private parties.

Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. *Harlow, supra,* at 819; *Pierson, supra,* at 554; *Anderson, supra,* at 638. Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. See, *e. g., Wood* v. *Strickland,* 420 U. S. 308, 319 (1975) (denial of qualified immunity to school board officials "'would contribute not to principled and fearless decision-making but to intimidation'") (quoting *Pierson, supra,* at 554); *Butz* v. *Economou,* 438 U. S. 478, 506 (1978) (immunity for Presidential aides warranted partly "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"); *Mitchell, supra,* at 526 (immunity designed to prevent the "'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service'" (quoting *Harlow, supra,* at 816)). In

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assert an affirmative defense based on a similar showing of good faith and/or probable cause. In neither case, however, is it appropriate to make the dissent's leap: that because these common law torts partially included an objective component—probable cause—private defendants sued under § 1983 should be entitled to the objectively determined, immediately appealable immunity from suit accorded certain government officials under *Harlow.*

short, the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents.

These rationales are not transferable to private parties. Although principles of equality and fairness may suggest, as respondents argue, that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion. Unlike school board members, see *Wood, supra,* or police officers, see *Malley* v. *Briggs,* 475 U. S. 335 (1986), or Presidential aides, see *Butz, supra,* private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

For these reasons, we can offer no relief today. The question on which we granted certiorari is a very narrow one: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials." Pet. for Cert. i. The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in *Harlow,* is available for private defendants faced with § 1983 liability for invoking a state replevin,

garnishment, or attachment statute. That answer is no. In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens. Because those issues are not fairly before us, however, we leave them for another day. Cf. *Yee* v. *Escondido*, 503 U. S., 519, 534–538 (1992).

IV

As indicated above, the District Court assumed that under *Lugar* v. *Edmondson Oil Co.*, *supra*, Cole was liable under § 1983 for invoking the state replevin under bond statute, and intimated that, but did not decide whether, Robbins also was subject to § 1983 liability. The Court of Appeals never revisited this question, but instead concluded only that respondents were entitled to qualified immunity at least for conduct prior to the statute's invalidation. Because we overturn this judgment, we must remand, since there remains to be determined, at least, whether Cole and Robbins, in invoking the replevin statute, acted under color of state law within the meaning of *Lugar*. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the opinion of the Court but find that a further and separate statement of my views is required.

I agree with what THE CHIEF JUSTICE writes in dissent respecting the historical origins of our qualified immunity jurisprudence but submit that the question presented to us requires that we reverse the judgment, as the majority holds. Indeed, the result reached by the Court is quite con-

sistent, in my view, with a proper application of the history THE CHIEF JUSTICE relates.

Both the Court and the dissent recognize that our original decisions recognizing defenses and immunities to suits brought under 42 U. S. C. § 1983 rely on analogous limitations existing in the common law when § 1983 was enacted. See *ante*, at 163–164; *post*, at 176–177. In *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), we held that § 1983 had not eradicated the absolute immunity granted legislators under the common law. And in *Pierson* v. *Ray*, 386 U. S. 547, 555–557 (1967), we recognized that under § 1983 police officers sued for false arrest had available what we described as a "defense of good faith and probable cause," based on their reasonable belief that the statute under which they acted was constitutional. *Id.*, at 557. *Pierson* allowed the defense because with respect to the analogous common-law tort, the Court decided that officers had available to them a similar defense. The good-faith and probable-cause defense evolved into our modern qualified-immunity doctrine. *Ante*, at 165–166.

Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in "freewheeling policy choice[s]." *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986). In cases involving absolute immunity we adhere to that view, granting immunity to the extent consistent with historical practice. *Ibid.*; *Burns* v. *Reed*, 500 U. S. 478, 485 (1991); *Hafer* v. *Melo*, 502 U. S. 21, 28–29 (1991). In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards. In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), we "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987). The transformation

was justified by the special policy concerns arising from public officials' exposure to repeated suits. *Harlow, supra,* at 813–814; *ante,* at 165–166. The dissent in today's case argues that similar considerations justify a transformation of common-law standards in the context of private-party defendants. *Post,* at 179–180. With this I cannot agree.

We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts. *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. 457 U. S., at 815–819. However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett,* 477 U. S. 317, 322 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.

It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by the Congress, which "on its face does not provide for *any* immunities." *Malley, supra,* at 342 (emphasis in original). We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted § 1983 acted in light of existing legal principles. *Owen* v. *City of Independence,* 445 U. S. 622, 637–638 (1980). That suggests, however, that we may not

transform what existed at common law based on our notions of policy or efficiency.

My conclusions are a mere consequence of the historical principles described in the dissent of THE CHIEF JUSTICE. The common-law tort actions most analogous to the action commenced here were malicious prosecution and abuse of process. *Post,* at 176. In both of the common-law actions, it was essential for the plaintiff to prove that the wrongdoer acted with malice and without probable cause. *Post,* at 176, n. 1. As THE CHIEF JUSTICE states, it is something of a misnomer to describe the common law as creating a good-faith *defense;* we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort. The malice element required the plaintiff to show that the challenged action was undertaken with an unlawful purpose, though it did not require a showing of ill will towards the plaintiff. J. Bishop, Commentaries on Non-Contract Law § 232, p. 92 (1889). To establish the absence of probable cause, a plaintiff was required to prove that a reasonable person, knowing what the defendant did, would not have believed that the prosecution or suit was well grounded, or that the defendant had in fact acted with the belief that the suit or prosecution in question was without probable cause. *Id.,* § 239, at 95. Our cases on the subject, beginning with *Harlow* v. *Fitzgerald,* diverge from the common law in two ways. First, as THE CHIEF JUSTICE acknowledges, modern qualified immunity does not turn upon the subjective belief of the defendant. *Post,* at 178, n. 2. Second, the immunity diverges from the common-law model by requiring the defendant, not the plaintiff, to bear the burden of proof on the probable-cause issue. *Supra* this page.

The decision to impose these requirements under a rule of immunity has implications, though, well beyond a mere determination that one party or the other is in a better position to bear the burden of proof. It implicates as well the law's definition of the wrong itself. At common law the ac-

tion lay because the essence of the wrong was an injury caused by a suit or prosecution commenced without probable cause or with knowledge that it was baseless. To cast the issue in terms of immunity, however, is to imply that a wrong was committed but that it cannot be redressed. The difference is fundamental, for at stake is the concept of what society considers proper conduct and what it does not. Beneath the nomenclature lie considerations of substance.

Harlow was cast as an immunity case, involving as it did suit against officers of the Government. And immunity, as distinct, say, from a defense on the merits or an element of the plaintiff's cause of action, is a legal inquiry, decided by the court rather than a jury, and on which an interlocutory appeal is available to defendants. *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Whether or not it is correct to diverge in these respects from the common-law model when governmental agents are the defendants, we ought not to adopt an automatic rule that the same analysis applies in suits against private persons. See *ante*, at 166–167, n. 2. By casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute. And as we have defined the immunity, we also eliminate from the case any demonstration of subjective good faith. Under the common law, however, if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause. Moreover, the question of the defendant's beliefs was almost always one for the jury. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194 (1879).

It is true that good faith may be difficult to establish in the face of a showing that from an objective standpoint no reasonable person could have acted as the defendant did, and in many cases the result would be the same under either test. This is why *Stewart* describes the instances where the probable cause turns on subjective intent as the exceptional

case. *Ibid.; post,* at 178, n. 2. That does not mean, however, that we may deprive plaintiffs of the opportunity to make their case. In some cases eliminating the defense based on subjective good faith can make a real difference, and again the instant case of alleged reliance on a statute deemed valid provides the example. It seems problematic to say that a defendant should be relieved of liability under some automatic rule of immunity if objective reliance upon a statute is reasonable but the defendant in fact had knowledge of its invalidity. Because the burden of proof on this question is the plaintiff's, the question may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case. *Siegert* v. *Gilley,* 500 U. S. 226, 236 (1991) (KENNEDY, J., concurring in judgment). The rule, of course, also works in reverse, for the existence of a statute thought valid ought to allow a defendant to argue that he acted in subjective good faith and is entitled to exoneration no matter what the objective test is.

The distinction I draw is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith. *Birdsall* v. *Smith,* 158 Mich. 390, 394, 122 N. W. 626, 627 (1909). Thus the subjective element dismissed as exceptional by the dissent may be the rule rather than the exception.

I join the opinion of the Court because I believe there is nothing contrary to what I say in that opinion. See *ante,* at 169 ("[W]e do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private . . . parties could

require plaintiffs to carry additional burdens"). Though they described the issue before them as "good-faith immunity," both the District Court and the Court of Appeals treated the question as one of law. App. 12–14; 928 F. 2d 718, 721–722 (CA5 1991). The Court of Appeals in particular placed heavy reliance on the policy considerations favoring a rule that citizens may rely on statutes presumed to be valid. *Ibid.* The latter inquiry, as *Birdsall* recognizes, however, goes mainly to the question of objective reasonableness. I do not understand either the District Court or the Court of Appeals to make an unequivocal finding that the respondents before us acted with subjective good faith when they filed suit under the Mississippi replevin statute. Furthermore, the question on which we granted certiorari was the narrow one whether private defendants in § 1983 suits are entitled to the same qualified immunity applicable to public officials, *ante,* at 168, which of course would be subject to the objective standard of *Harlow* v. *Fitzgerald.* Under my view the answer to that question is no. Though it might later be determined that there is no triable issue of fact to save the plaintiff's case in the matter now before us, on remand it ought to be open to him at least in theory to argue that the defendants' bad faith eliminates any reliance on the statute, just as it ought to be open to the defendants to show good faith even if some construct of a reasonable person in the defendants' position would have acted in a different way.

So I agree the case must be remanded for further proceedings.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SOUTER and JUSTICE THOMAS join, dissenting.

The Court notes that we have recognized an immunity in the § 1983 context in two circumstances. The first is when a similarly situated defendant would have enjoyed an immunity at common law at the time § 1983 was adopted. *Ante,* at 163–164. The second is when important public policy con-

cerns suggest the need for an immunity. *Ante*, at 166–167. Because I believe that both requirements, as explained in our prior decisions, are satisfied here, I dissent.

First, I think it is clear that at the time § 1983 was adopted, there generally was available to private parties a good-faith defense to the torts of malicious prosecution and abuse of process.[1] See authorities cited *ante*, at 164; *Malley* v. *Briggs*, 475 U. S. 335, 340–341 (1986) (noting that the generally accepted rule at common law was that a person would be held liable if "the complaint was made maliciously and without probable cause"); *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967) (noting that at common law a police officer sued for false arrest can rely on his own good faith in making the arrest). And while the Court is willing to assume as much, *ante*, at 165, it thinks this insufficient to sustain respondents' claim to an immunity because the "qualified immunity" respondents' seek is not equivalent to such a "defense," *ante*, at 165–166.

But I think the Court errs in suggesting that the availability of a good-faith common-law defense at the time of § 1983's adoption is not sufficient to support their claim to immunity. The case on which respondents principally rely, *Pierson*, considered whether a police officer sued under § 1983 for false arrest could rely on a showing of good faith in order to escape liability. And while this Court concluded that the officer could rely on his own good faith, based in large part on the fact that a good-faith defense had been available at common law, the Court was at best ambiguous as to whether it

[1] Describing the common law as providing a "defense" is something of a misnomer—under the common law it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice *and* without probable cause. T. Cooley, Law of Torts 184–185 (1879); J. Bishop, Commentaries on Non-Contract Law § 225, p. 90 (1889). Referring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing *either* a lack of malice or the presence of probable cause.

was recognizing a "defense" or an "immunity." Compare 386 U. S., at 556 (criticizing Court of Appeals for concluding that no "immunity" was available), with *id.*, at 557 (recognizing a good-faith "defense"). Any initial ambiguity, however, has certainly been eliminated by subsequent cases; there can be no doubt that it is a qualified immunity to which the officer is entitled. See *Malley, supra,* at 340. Similarly, in *Wood* v. *Strickland,* 420 U. S. 308, 318 (1975), we recognized that, "[a]lthough there have been differing emphases and formulations of the common-law immunity," the general recognition under state law that public officers are entitled to a good-faith defense was sufficient to support the recognition of a § 1983 immunity.

Thus, unlike the Court, I think our prior precedent establishes that a demonstration that a good-faith defense was available at the time § 1983 was adopted does, in fact, provide substantial support for a contemporary defendant claiming that he is entitled to qualified immunity in the analogous § 1983 context. While we refuse to recognize a common-law immunity if § 1983's history or purpose counsel against applying it, *ante,* at 164, I see no such history or purpose that would so counsel here.

Indeed, I am at a loss to understand what is accomplished by today's decision—other than a needlessly fastidious adherence to nomenclature—given that the Court acknowledges that a good-faith defense will be available for respondents to assert on remand. Respondents presumably will be required to show the traditional elements of a good-faith defense—either that they acted without malice *or* that they acted with probable cause. See n. 1, *supra; Stewart* v. *Sonneborn,* 98 U. S. 187, 194 (1879); W. Prosser, Law of Torts § 120, p. 854 (4th ed. 1971). The first element, "maliciousness," encompasses an inquiry into subjective intent for bringing the suit. *Stewart, supra,* at 192–193; Prosser, *supra,* § 120, at 855. This quite often includes an inquiry into the defendant's subjective belief as to whether he be-

lieved success was likely. See, *e. g.*, 2 C. Addison, Law of Torts ¶ 854 (1876) ("Proof of the absence of belief in the truth of the charge by the person making it . . . is almost always involved in the proof of malice"). But the second element, "probable cause," focuses principally on *objective* reasonableness. *Stewart*, *supra*, at 194; Prosser, *supra*, § 120, at 854. Thus, respondents can successfully defend this suit simply by establishing that their reliance on the replevin statute was objectively reasonable for someone with their knowledge of the circumstances. But this is precisely the showing that entitles a public official to immunity. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982) (official must show his action did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known").[2]

Nor do I see any reason that this "defense" may not be asserted early in the proceedings on a motion for summary judgment, just as a claim to qualified immunity may be. Provided that the historical facts are not in dispute, the presence or absence of "probable cause" has long been acknowledged to be a question of law. *Stewart*, *supra*, at 193–194; 2 Addison, *supra*, ¶ 853, n. (p); J. Bishop, Commentaries on Non-Contract Law § 240, p. 95 (1889). And so I see no reason that the trial judge may not resolve a summary judgment motion premised on such a good-faith defense, just as we have encouraged trial judges to do with respect to qualified

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[2] There is perhaps one small difference between the historic common-law inquiry and the modern qualified immunity inquiry. At common law, a plaintiff can show the lack of probable cause either by showing that the actual facts did not amount to probable cause (an objective inquiry) or by showing that the defendant lacked a sincere belief that probable cause existed (a subjective inquiry). Bishop, Commentaries on Non-Contract Law § 239, at 95. But relying on the subjective belief, rather than on an objective lack of probable cause, is clearly exceptional. See *Stewart* v. *Sonneborn*, 98 U. S. 187, 194 (1879) (describing subjective basis for finding lack of probable cause as exception to general rule). I see no reason to base our decision whether to extend a contemporary, objectively based qualified immunity on the exceptional common-law case.

immunity claims. *Harlow, supra,* at 818. Thus, private defendants who have invoked a state attachment law are put in the same position whether we recognize that they are entitled to qualified immunity or if we instead recognize a good-faith defense. Perhaps the Court believes that the "defense" will be less amenable to summary disposition than will the "immunity"; perhaps it believes the defense will be an issue that must be submitted to the jury, see *ante,* at 168 (referring to cases such as this "proceed[ing] to trial"). While I can see no reason why this would be so (given that probable cause is a legal question), if it is true, today's decision will only manage to increase litigation costs needlessly for hapless defendants.

This, in turn, leads to the second basis on which we have previously recognized a qualified immunity—reasons of public policy. Assuming that some practical difference will result from recognizing a defense but not an immunity, I think such a step is neither dictated by our prior decisions nor desirable. It is true, as the Court points out, that in abandoning a strictly historical approach to § 1983 immunities we have often explained our decision to recognize an immunity in terms of the special needs of public officials. But those cases simply do not answer—because the question was not at issue—whether similar (or even completely unrelated) reasons of public policy would warrant immunity for private parties as well.

I believe there are such reasons. The normal presumption that attaches to any law is that society will be benefited if private parties rely on that law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief. In denying immunity to those who reasonably rely on presumptively valid state law, and thereby discouraging such reliance, the Court expresses confidence that today's decision will not "unduly impai[r]," *ibid.,* the public interest. I do not share that confidence. I would have thought it beyond peradventure that there is strong public

interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity. *Buller* v. *Buechler*, 706 F. 2d 844, 851 (CA8 1983); *Folsom Investment Co.* v. *Moore*, 681 F. 2d 1032, 1037–1038 (CA5 1982).

Second, as with the police officer making an arrest, I believe the private plaintiff's lot is "not so unhappy" that he must forgo recovery of property he believes to be properly recoverable through available legal processes or to be "mulcted in damages," *Pierson*, 386 U. S., at 555, if his belief turns out to be mistaken. For as one Court of Appeals has pointed out, it is at least passing strange to conclude that private individuals are acting "under color of law" because they invoke a state garnishment statute and the aid of state officers, see *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982), but yet deny them the immunity to which those same state officers are entitled, simply because the private parties are not state employees. *Buller*, *supra*, at 851. While some of the strangeness may be laid at the doorstep of our decision in *Lugar*, see 457 U. S., at 943 (Burger, C. J., dissenting); and *id.*, at 944–956 (Powell, J., dissenting), there is no reason to proceed still further down this path. Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was "to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement." *Id.*, at 948 (emphasis added). See also *Monroe* v. *Pape*, 365 U. S. 167, 175–176 (1961).

Because I find today's decision dictated neither by our own precedent nor by any sound considerations of public policy, I dissent.

Syllabus

WADE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91–5771. Argued March 23, 1992—Decided May 18, 1992

After his arrest on, *inter alia*, federal drug charges, petitioner Wade gave law enforcement officials information that led them to arrest another drug dealer. Subsequently, he pleaded guilty to the charges, and the District Court sentenced him to the 10-year minimum sentence required by 21 U. S. C. § 841(b)(1)(B) and the United States Sentencing Commission, Guidelines Manual (USSG). The court refused Wade's request that his sentence be reduced below the minimum to reward him for his substantial assistance to the Government, holding that 18 U. S. C. § 3553(e) and USSG § 5K1.1 empower the district courts to make such a reduction only if the Government files a motion requesting the departure. The Court of Appeals affirmed, rejecting Wade's arguments that the District Court erred in holding that the absence of a Government motion deprived it of the authority to reduce his sentence and that the lower court was authorized to enquire into the Government's motives for failing to file a motion.

Held:

1. Federal district courts have the authority to review the Government's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Since the parties assume that the statutory and Guidelines provisions pose identical and equally burdensome obstacles, this Court is not required to decide whether § 5K1.1 "implements" and thereby supersedes § 3553(e) or whether the provisions pose separate obstacles. In both provisions, the condition limiting the court's authority gives the Government a power, not a duty, to file a substantial-assistance motion. Nonetheless, a prosecutor's discretion when exercising that power is subject to constitutional limitations that district courts can enforce. Thus, a defendant would be entitled to relief if the prosecution refused to file a motion for a suspect reason such as the defendant's race or religion. However, neither a claim that a defendant merely provided substantial assistance nor additional but generalized allegations of improper motive will entitle a defendant to a remedy or even to discovery or an evidentiary hearing. A defendant has a right to the latter procedures only if he makes a substantial threshold showing of improper motive. Pp. 184–186.

2. Wade has failed to raise a claim of improper motive. He has never alleged or pointed to evidence tending to show that the Government refused to file a motion for suspect reasons. And he argues to no avail that, because the District Court erroneously believed that no impermissible motive charge could state a claim for relief, it thwarted his attempt to show that the Government violated his constitutional rights by withholding the motion arbitrarily or in bad faith. While Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end, the record here shows no support for his claim of frustration, and the claim as presented to the District Court failed to rise to the level warranting judicial enquiry. In response to the court's invitation to state what evidence he would introduce to support his claim, Wade merely explained the extent of his assistance to the Government. This is a necessary, but not a sufficient, condition for relief, because the Government's decision not to move may have been based simply on its rational assessment of the cost and benefit that would flow from moving. Pp. 186–187.

936 F. 2d 169, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

J. Matthew Martin, by appointment of the Court, 502 U. S. 1028, argued the cause for petitioner. With him on the briefs was *Eugene Gressman.*

Robert A. Long, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson*, and *Nina Goodman.**

JUSTICE SOUTER delivered the opinion of the Court.

Section 3553(e) of Title 18 of the United States Code empowers district courts, "[u]pon motion of the Government," to impose a sentence below the statutory minimum to reflect a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." Similarly, § 5K1.1 of the United States Sentencing Commission, Guidelines Manual (Nov. 1991) (USSG), permits

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**Charles B. Wayne* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

district courts to go below the minimum required under the Guidelines if the Government files a "substantial assistance" motion. This case presents the question whether district courts may subject the Government's refusal to file such a motion to review for constitutional violations. We hold that they may, but that the petitioner has raised no claim to such review.

On October 30, 1989, police searched the house of the petitioner, Harold Ray Wade, Jr., discovered 978 grams of cocaine, two handguns, and more than $22,000 in cash, and arrested Wade. In the aftermath of the search, Wade gave law enforcement officials information that led them to arrest another drug dealer. In due course, a federal grand jury indicted Wade for distributing cocaine and possessing cocaine with intent to distribute it, both in violation of 21 U. S. C. § 841(a)(1); for conspiring to do these things, in violation of § 846; and for using or carrying a firearm during, and in relation to, a drug crime, in violation of 18 U. S. C. § 924(c)(1). Wade pleaded guilty to all four counts.

The presentence report put the sentencing range under the Guidelines for the drug offenses at 97 to 121 months, but added that Wade was subject to a 10-year mandatory minimum sentence, 21 U. S. C. § 841(b)(1)(B), narrowing the actual range to 120 to 121 months, see USSG § 5G1.1(c)(2). The report also stated that both USSG § 2K2.4(a) and 18 U. S. C. § 924(c) required a 5-year sentence on the gun count. At the sentencing hearing in the District Court, Wade's lawyer urged the court to impose a sentence below the 10-year minimum for the drug counts to reward Wade for his assistance to the Government. The court responded that the Government had filed no motion as contemplated in 18 U. S. C. § 3553(e) and USSG § 5K1.1 for sentencing below the minimum, and ruled that, without such a motion, a court had no power to go beneath the minimum. Wade got a sentence of 180 months in prison.

In the United States Court of Appeals for the Fourth Circuit, Wade argued the District Court was in error to say that the absence of a Government motion deprived it of authority to impose a sentence below 10 years for the drug convictions. Wade lost this argument, 936 F. 2d 169, 171 (1991), and failed as well on his back-up claim that the District Court was at least authorized to enquire into the Government's motives for filing no motion, the court saying that any such enquiry would intrude unduly upon a prosecutor's discretion, *id.*, at 172. We granted certiorari, 502 U. S. 1003 (1991), and now affirm.

The full text of 18 U. S. C. § 3553(e) is this:

> "Limited Authority to Impose a Sentence Below a Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code."

And this is the relevant portion of USSG § 5K1.1:

> "*Substantial Assistance to Authorities* (Policy Statement)
>
> "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

Because Wade violated federal criminal statutes that carry mandatory minimum sentences, this case implicates both 18 U. S. C. § 3553(e) and USSG § 5K1.1. Wade and the Government apparently assume that where, as here, the minimum

under the Guidelines is the same as the statutory minimum and the Government has refused to file any motion at all, the two provisions pose identical and equally burdensome obstacles. See Brief for Petitioner 9, n. 2; Brief for United States 11, n. 2. We are not, therefore, called upon to decide whether § 5K1.1 "implements" and thereby supersedes § 3553(e), see *United States* v. *Ah-Kai*, 951 F. 2d 490, 493–494 (CA2 1991); *United States* v. *Keene*, 933 F. 2d 711, 713–714 (CA9 1991), or whether the two provisions pose two separate obstacles, see *United States* v. *Rodriguez-Morales*, 958 F. 2d 1441, 1443–1447 (CA8 1992).

Wade concedes, as a matter of statutory interpretation, that § 3553(e) imposes the condition of a Government motion upon the district court's authority to depart, Brief for Petitioner 9–10, and he does not argue otherwise with respect to § 5K1.1. He does not claim that the Government-motion requirement is itself unconstitutional, or that the condition is superseded in this case by any agreement on the Government's behalf to file a substantial-assistance motion, cf. *Santobello* v. *New York*, 404 U. S. 257, 262–263 (1971); *United States* v. *Conner*, 930 F. 2d 1073, 1075–1077 (CA4), cert. denied, 502 U. S. 958 (1991). Wade's position is consistent with the view, which we think is clearly correct, that in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.

Wade nonetheless argues, and again we agree, that a prosecutor's discretion when exercising that power is subject to constitutional limitations that district courts can enforce. Because we see no reason why courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions, see, *e. g.*, *Wayte* v. *United States*, 470 U. S. 598, 608–609 (1985), we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an uncon-

stitutional motive. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion.

It follows that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing. Nor would additional but generalized allegations of improper motive. See, *e. g.*, *United States* v. *Redondo-Lemos*, 955 F. 2d 1296, 1302–1303 (CA9 1992); *United States* v. *Jacob*, 781 F. 2d 643, 646–647 (CA8 1986); *United States* v. *Gallegos-Curiel*, 681 F. 2d 1164, 1169 (CA9 1982) (Kennedy, J.); *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (CA2 1974). Indeed, Wade concedes that a defendant has no right to discovery or an evidentiary hearing unless he makes a "substantial threshold showing." Brief for Petitioner 26.

Wade has failed to make one. He has never alleged, much less claimed to have evidence tending to show, that the Government refused to file a motion for suspect reasons such as his race or his religion. Instead, Wade argues now that the District Court thwarted his attempt to make quite different allegations on the record because it erroneously believed that no charge of impermissible motive could state a claim for relief. Hence, he now seeks an order of remand to allow him to develop a claim that the Government violated his constitutional rights by withholding a substantial-assistance motion "arbitrarily" or "in bad faith." See Brief for Petitioner 25. This, Wade says, the Government did by refusing to move because of "factors that are not rationally related to any legitimate state objective," see Reply Brief for Petitioner 4, although he does not specifically identify any such factors.

As the Government concedes, see Brief for United States 26 (citing *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) *(per curiam)*), Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end, cf. *Chapman* v. *United States*, 500 U. S. 453, 464–465 (1991), but his argument is still of no avail.

This is so because the record shows no support for his claim of frustration in trying to plead an adequate claim, and because his claim as presented to the District Court failed to rise to the level warranting judicial enquiry. The District Court expressly invited Wade's lawyer to state for the record what evidence he would introduce to support his position if the court were to conduct a hearing on the issue. App. 10. In response, his counsel merely explained the extent of Wade's assistance to the Government. *Ibid.* This, of course, was not enough, for although a showing of assistance is a necessary condition for relief, it is not a sufficient one. The Government's decision not to move may have been based not on a failure to acknowledge or appreciate Wade's help, but simply on its rational assessment of the cost and benefit that would flow from moving. Cf. *United States* v. *Doe*, 290 U. S. App. D. C. 65, 70, 934 F. 2d 353, 358, cert. denied, 502 U. S. 896 (1991); *United States* v. *La Guardia*, 902 F. 2d 1010, 1016 (CA1 1990).

It is clear, then, that, on the present record, Wade is entitled to no relief, and that the judgment of the Court of Appeals must be

Affirmed.

Per Curiam

COLEMAN *v.* THOMPSON, WARDEN, ET AL.

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

No. A–877 (91–8336). Decided May 20, 1992

In the 12th round of judicial review in a murder case which began 11 years ago, the District Court concluded that applicant Coleman had failed to produce even a "colorable claim of innocence."

Held: The application for a stay of execution is denied. There is no basis for this Court to conclude that Coleman has produced "substantial evidence" of innocence, especially where the District Court has reviewed the claim and rejected it on the merits.

Application denied.

PER CURIAM.

As the District Court below observed, this is now the 12th round of judicial review in a murder case which began 11 years ago. Yet despite having had 11 years to produce exculpatory evidence, Coleman has produced what, in the words of the District Court, does not even amount to a "colorable showing of 'actual innocence.'" Civ. Action No. 92–0352–R (WD Va., May 12, 1992), p. 19. We are hardly well positioned to second-guess the District Court's factual conclusion—we certainly have no basis for concluding that Coleman has produced "*substantial* evidence that he may be innocent." *Post*, at 189 (emphasis added). Indeed, a good deal of Coleman's effort in this latest round is devoted to an attempt to undermine an expert's genetic analysis that further implicated him in the crime—an analysis conducted after trial at *Coleman's* request under the supervision of the Commonwealth's courts.

Contrary to the dissent's characterization, Coleman's claim is far from "substantially identical" to that of Leonel Herrera, see *Herrera* v. *Collins*, No. 91–7328, cert. granted, 502 U. S. 1085 (1992). In *Herrera* the District Court concluded that the evidence of innocence warranted further inquiry.

See 954 F. 2d 1029 (CA5 1992). Here, in contrast, the District Court reviewed Coleman's claim of innocence and rejected it on the merits.

The application for stay of execution presented to THE CHIEF JUSTICE and by him referred to the full Court is denied.

It is so ordered.

JUSTICE STEVENS concurs in the denial of a stay and would deny the petition for writ of certiorari.

JUSTICE BLACKMUN, dissenting.

Last Term the Court ruled that Roger Coleman could not present his arguments on the merits to the federal courts, simply because the person then acting as his attorney had made a trivial error in filing his notice of appeal three days late. *Coleman* v. *Thompson*, 501 U. S. 722 (1991). While I dissented from that ruling—and still believe it was erroneous—I found some consolation in the Court's suggestion that matters might have been different had Coleman argued that he was actually innocent of the crime. See *id.*, at 747–751, 757.

Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die. Yet the Court once again turns him away, this time permitting the Commonwealth of Virginia to execute him without a hearing at which his evidence could be fully presented. The Court's ruling is all the more troubling for me, in view of this Court's decision to hear argument next Term in a case in which the petitioner contends, just as Coleman does, that evidence of his innocence entitles him to a hearing on the merits. *Herrera* v. *Collins*, No. 91–7328, cert. granted, 502 U. S. 1085 (1992).

I have previously voted to stay an execution pending this Court's decision next Term in *Herrera*. See *Ellis* v. *Texas*, 503 U. S. 915 (1992); *Ellis* v. *Collins*, 503 U. S. 915 (1992). I

cannot believe that Coleman, who raises a substantially identical claim, should be denied all possibility of relief simply because his petition reached this Court later than did Leonel Herrera's. Accordingly, I would stay the execution.

JUSTICE SOUTER would grant the application for stay of execution.

Syllabus

BURSON, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE *v.* FREEMAN

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 90–1056. Argued October 8, 1991—Decided May 26, 1992

Respondent Freeman, while the treasurer for a political campaign in Tennessee, filed an action in the Chancery Court, alleging, among other things, that § 2–7–111(b) of the Tennessee Code—which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place—limited her ability to communicate with voters in violation of, *inter alia*, the First and Fourteenth Amendments. The court dismissed her suit, but the State Supreme Court reversed, ruling that the State had a compelling interest in banning such activities within the polling place itself but not on the premises around the polling place. Thus, it concluded, the 100-foot limit was not narrowly tailored to protect, and was not the least restrictive means to serve, the State's interests.

Held: The judgment is reversed, and the case is remanded.

802 S. W. 2d 210, reversed and remanded.

JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded that § 2–7–111(b) does not violate the First and Fourteenth Amendments. Pp. 196–211.

(a) The section is a facially content-based restriction on political speech in a public forum and, thus, must be subjected to exacting scrutiny: The State must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. This case presents a particularly difficult reconciliation, since it involves a conflict between the exercise of the right to engage in political discourse and the fundamental right to vote, which is at the heart of this country's democracy. Pp. 196–198.

(b) Section 2–7–111(b) advances Tennessee's compelling interests in preventing voter intimidation and election fraud. There is a substantial and long-lived consensus among the 50 States that *some* restricted zone around polling places is necessary to serve the interest in protecting the right to vote freely and effectively. The real question then is *how large* a restricted zone is permissible or sufficiently tailored. A State is not required to prove empirically that an election regulation is perfectly tailored to secure such a compelling interest. Rather, legislatures should be permitted to respond to potential deficiencies in the electoral process with foresight, provided that the response is reasonable and

Syllabus

does not significantly impinge on constitutionally protected rights. *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 195–196. Section 2–7–111(b)'s minor geographical limitation does not constitute such a significant impingement. While it is possible that at some measurable distance from the polls governmental regulation of vote solicitation could effectively become an impermissible burden on the First Amendment, Tennessee, in establishing its 100-foot boundary, is on the constitutional side of the line. Pp. 198–211.

JUSTICE SCALIA concluded that § 2–7–111 is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. The environs of a polling place, including adjacent streets and sidewalks, have traditionally not been devoted to assembly and debate and therefore do not constitute a traditional public forum. Cf. *Greer* v. *Spock*, 424 U. S. 828. Thus, speech restrictions such as those in § 2–7–111 need not be subjected to "exacting scrutiny" analysis. Pp. 214–216.

BLACKMUN, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 211. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 214. STEVENS, J., filed a dissenting opinion, in which O'CONNOR and SOUTER, JJ., joined, *post*, p. 217. THOMAS, J., took no part in the consideration or decision of the case.

Charles W. Burson, Attorney General of Tennessee, petitioner, argued the cause, *pro se*. With him on the briefs were *John Knox Walkup*, Solicitor General, and *Andy D. Bennett* and *Michael W. Catalano*, Deputy Attorneys General.

John E. Herbison argued the cause for respondent. With him on the brief was *Alan B. Morrison*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Arizona et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, and *James M. Johnson*, Senior Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Gail Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Warren Price III* of Hawaii, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Bonnie J. Campbell* of Iowa, *Frederic J. Cowan* of Kentucky, *Michael E. Carpenter* of Maine, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY join.

Twenty-six years ago, this Court, in a majority opinion written by Justice Hugo L. Black, struck down a state law that made it a crime for a newspaper editor to publish an editorial on election day urging readers to vote in a particular way. *Mills* v. *Alabama*, 384 U. S. 214 (1966). While the Court did not hesitate to denounce the statute as an "obvious and flagrant abridgment" of First Amendment rights, *id.*, at 219, it was quick to point out that its holding "in no way involve[d] the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there," *id.*, at 218.

Today, we confront the issue carefully left open in *Mills*. The question presented is whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place, violates the First and Fourteenth Amendments.

I

The State of Tennessee has carved out an election-day "campaign-free zone" through §2–7–111(b) of its election code. That section reads in pertinent part:

> "Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or posi-

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Nevada, *Nicholas J. Spaeth* of North Dakota, *Mark Barnett* of South Dakota, *Paul Van Dam* of Utah, *Mary Sue Terry* of Virginia, and *Mario J. Palumbo* of West Virginia; and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Frederick C. Schafrick*.

tion on a question are prohibited." Tenn. Code Ann. §2–7–111(b) (Supp. 1991).[1]

Violation of §2–7–111(b) is a Class C misdemeanor punishable by a term of imprisonment not greater than 30 days or a fine not to exceed $50, or both. Tenn. Code Ann. §§2–19–119 and 40–35–111(e)(3) (1990).

II

Respondent Mary Rebecca Freeman has been a candidate for office in Tennessee, has managed local campaigns, and has worked actively in statewide elections. In 1987, she was the treasurer for the campaign of a city-council candidate in Metropolitan Nashville-Davidson County.

Asserting that §§2–7–111(b) and 2–19–119 limited her ability to communicate with voters, respondent brought a facial challenge to these statutes in Davidson County Chancery Court. She sought a declaratory judgment that the provisions were unconstitutional under both the United States and the Tennessee Constitutions. She also sought a permanent injunction against their enforcement.

The Chancellor ruled that the statutes did not violate the United States or Tennessee Constitutions and dismissed respondent's suit. App. 50. He determined that §2–7–111(b) was a content-neutral and reasonable time, place, and manner restriction; that the 100-foot boundary served a compelling state interest in protecting voters from interference, ha-

[1] Section 2–7–111(a) also provides for boundaries of 300 feet for counties within specified population ranges. Petitioner's predecessor Attorney General (an original defendant) opined that this distinction was unconstitutional under Art. XI, §8, of the Tennessee Constitution. Tenn. Op. Atty. Gen. No. 87–185 (1987). While this issue was raised in the pleadings, the District Court held that respondent did not have standing to challenge the 300-foot boundaries because she was not a resident of any of those counties. The Tennessee Supreme Court did not reach the issue. Accordingly, the constitutionality of the 100-foot boundary is the only restriction before us.

rassment, and intimidation during the voting process; and that there was an alternative channel for respondent to exercise her free speech rights outside the 100-foot boundary. App. to Pet. for Cert. 1a.

The Tennessee Supreme Court, by a 4-to-1 vote, reversed. 802 S. W. 2d 210 (1990). The court first held that §2–7–111(b) was content based "because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." *Id.*, at 213. The court then held that such a content-based statute could not be upheld unless (i) the burden placed on free speech rights is justified by a compelling state interest and (ii) the means chosen bear a substantial relation to that interest and are the least intrusive to achieve the State's goals. While the Tennessee Supreme Court found that the State unquestionably had shown a compelling interest in banning solicitation of voters and distribution of campaign materials within the polling place itself, it concluded that the State had not shown a compelling interest in regulating the premises around the polling place. Accordingly, the court held that the 100-foot limit was not narrowly tailored to protect the demonstrated interest. The court also held that the statute was not the least restrictive means to serve the State's interests. The court found less restrictive the current Tennessee statutes prohibiting interference with an election or the use of violence or intimidation to prevent voting. See Tenn. Code Ann. §§2–19–101 and 2–19–115 (Supp. 1991). Finally, the court noted that if the State were able to show a compelling interest in preventing congestion and disruption at the entrances to polling places, a shorter radius "might perhaps pass constitutional muster." 802 S. W. 2d, at 214.

Because of the importance of the issue, we granted certiorari. 499 U. S. 958 (1991). We now reverse the Tennessee Supreme Court's judgment that the statute violates the First Amendment of the United States Constitution.

III

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." This Court in *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940), said: "The freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."

The Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech. The speech restricted by § 2–7–111(b) obviously is political speech. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U. S., at 218. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, this Court has recognized that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco Cty. Democratic Central Comm.*, 489 U. S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971)).

The second important feature of § 2–7–111(b) is that it bars speech in quintessential public forums. These forums include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983).[2] "Such use

[2] Testimony at trial established that at some Tennessee polling locations the campaign-free zone included sidewalks and streets adjacent to the polling places. See App. 23–24, 42. See also 802 S. W. 2d 210, 213 (1990).

of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *United States* v. *Grace*, 461 U. S. 171, 177 (1983). See also *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989).

The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic. See, *e. g.*, *Consolidated Edison Co. of N. Y.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 537 (1980). Accord, *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991) (statute restricting speech about crime is content based).[3]

[3] Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972) (exemption of labor picketing from ban on picketing near schools violates Fourteenth Amendment right to equal protection). See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 816 (1984) (suggesting that exception for political campaign signs from general ordinance prohibiting posting of signs might entail constitutionally forbidden content discrimina-

As a facially content-based restriction on political speech in a public forum, § 2–7–111(b) must be subjected to exacting scrutiny: The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 45. Accord, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 573 (1987); *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985); *United States* v. *Grace*, 461 U. S., at 177.

Despite the ritualistic ease with which we state this now-familiar standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. See, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333, 361–363 (1966) (outlining restrictions on speech of trial participants that courts may impose to protect an accused's right to a fair trial). This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.

IV

Tennessee asserts that its campaign-free zone serves two compelling interests. First, the State argues that its regulation serves its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice.[4]

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tion). Under either a free speech or equal protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny. *Carey* v. *Brown*, 447 U. S. 455, 461–462 (1980).

[4] See *Piper* v. *Swan*, 319 F. Supp. 908, 911 (ED Tenn. 1970) (purpose of regulation is to prevent intimidation of voters entering the polling place by political workers), writ of mandamus denied *sub nom. Piper* v. *United States District Court*, 401 U. S. 971 (1971).

Second, Tennessee argues that its restriction protects the right to vote in an election conducted with integrity and reliability.[5]

The interests advanced by Tennessee obviously are compelling ones. This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). Indeed,

> "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964).

Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence. See *Eu*, 489 U. S., at 228–229.

The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." *Id.*, at 231. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.

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[5] See Tennessee Law Revision Commission, Special Report of the Law Revision Commission to Eighty-Seventh General Assembly of Tennessee Concerning a Bill to Adopt an Elections Act Containing a Unified and Coherent Treatment of All Elections 13 (1972) (provision is one of numerous safeguards included to preserve "purity of elections").

While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.

During the colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the *viva voce* system gave for bribery and intimidation gradually led to its repeal. See generally E. Evans, A History of the Australian Ballot System in the United States 1–6 (1917) (Evans); J. Harris, Election Administration in the United States 15–16 (1934) (Harris); J. Rusk, The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876–1908, pp. 8–11 (1968) (Rusk).

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. Initially, this paper ballot was a vast improvement. Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting. But the effort of making out such a ballot became increasingly more complex and cumbersome. See generally S. Albright, The American Ballot 14–19 (1942) (Albright); Evans 5; Rusk 9–14.

Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted—the vote buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box. Thus, the evils associated with the earlier *viva voce* system reinfected the election process; the failure of

the law to secure secrecy opened the door to bribery[6] and intimidation.[7] See generally Albright 19–20; Evans 7, 11; Harris 17, 151–152; V. Key, Politics, Parties, and Pressure Groups 649 (1952); J. Reynolds, Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880–1920, p. 36 (1988); Rusk 14–23.

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[6] One writer described the conditions as follows:

"This sounds like exaggeration, but it is truth; and these are facts so notorious that no one acquainted with the conduct of recent elections now attempts a denial—that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election." J. Gordon, The Protection of Suffrage 13 (1891) (quoted in Evans 11).

Evans reports that the bribery of voters in Indiana in 1880 and 1888 was sufficient to determine the results of the election and that "[m]any electors, aware that the corrupt element was large enough to be able to turn the election, held aloof altogether." *Ibid.*

[7] According to a report of a committee of the 46th Congress, men were frequently marched or carried to the polls in their employers' carriages. They were then furnished with ballots and compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box. S. Rep. No. 497, 46th Cong., 2d Sess., 9–10 (1880).

Evans recounted that intimidation, particularly by employers, was "extensively practiced":

"Many labor men were afraid to vote and remained away from the polls. Others who voted against their employers' wishes frequently lost their jobs. If the employee lived in a factory town, he probably lived in a tenement owned by the company, and possibly his wife and children worked in the mill. If he voted against the wishes of the mill-owners, he and his family were thrown out of the mill, out of the tenement, and out of the means of earning a livelihood. Frequently the owner and the manager of the mill stood at the entrance of the polling-place and closely observed the employees while they voted. In this condition, it cannot be said that the workingmen exercised any real choice." Evans 12–13 (footnote omitted).

Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Evans 9. Often the competition became heated when several such peddlers found an uncommitted or wavering voter. See L. Fredman, The Australian Ballot: The Story of an American Reform 24 (1968) (Fredman); Rusk 17. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. See Fredman 24, 26–27; 143 North American Review 628–629 (1886) (cited in Evans 16). In short, these early elections "were not a very pleasant spectacle for those who believed in democratic government." *Id.*, at 10.

The problems with voter intimidation and election fraud that the United States was experiencing were not unique. Several other countries were attempting to work out satisfactory solutions to these same problems. Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket. But this was not the only measure adopted to preserve the secrecy of the ballot. The Australian system also provided for the erection of polling booths (containing several voting compartments) open only to election officials, two "scrutinees" for each candidate, and electors about to vote. See J. Wigmore, The Australian Ballot System as Embodied in the Legislation of Various Countries 69, 71, 78, 79 (1889) (Wigmore) (excerpting provisions adopted by South Australia and Queensland). See generally Albright 23; Evans 17; Rusk 23–24.

The Australian system was enacted in England in 1872 after a study by the committee of election practices identified Australia's ballot as the best possible remedy for the existing situation. See Wigmore 14–16. Belgium followed Eng-

land's example in 1877. Like the Australian provinces, both England and Belgium excluded the general public from the entire polling room. See Wigmore 94, 105. See generally Albright 23–24; Evans 17–18; Rusk 24–25.

One of the earliest indications of the reform movement in this country came in 1882 when the Philadelphia Civil Service Reform Association urged its adoption in a pamphlet entitled "English Elections." Many articles were written praising its usefulness in preventing bribery, intimidation, disorder, and inefficiency at the polls. Commentators argued that it would diminish the growing evil of bribery by removing the knowledge of whether it had been successful. Another argument strongly urged in favor of the reform was that it would protect the weak and dependent against intimidation and coercion by employers and creditors. The inability to determine the effectiveness of bribery and intimidation accordingly would create order and decency at the polls. See generally Albright 24–26; Evans 21–23; Rusk 25–29, 42–43.

After several failed attempts to adopt the Australian system in Michigan and Wisconsin, the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian system in 1888. The Louisville law prohibited all but voters, candidates or their agents, and electors from coming within 50 feet of the voting room inclosure. The Louisville law also provided that candidates' agents within the restricted area "were not allowed to persuade, influence, or intimidate any one in the choice of his candidate, or to attempt doing so . . . ." Wigmore 120. The Massachusetts and New York laws differed somewhat from the previous Acts in that they excluded the general public only from the area encompassed within a guardrail constructed six feet from the voting compartments. See *id.*, at 47, 128. This modification was considered an improvement because it provided additional monitoring by members of the general public and independent

candidates, who in most States were not allowed to be represented by separate inspectors. Otherwise, "in order to perpetrate almost every election fraud it would only be necessary to buy up the election officers of the other party." *Id.*, at 52. Finally, New York also prohibited any person from "electioneering on election day within any polling-place, or within one hundred feet of any polling place." *Id.*, at 131. See generally Evans 18–21; Rusk 26.

The success achieved through these reforms was immediately noticed and widely praised. See generally Evans 21–24; Rusk 26–31, 42–43. One commentator remarked of the New York law of 1888:

> "We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.
>
> "In earlier times our polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.' This also has come to an end, and until nightfall, when the jubilation begins, our election days are now as peaceful as our Sabbaths.
>
> "The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls." W. Ivins, The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association 316 (1906).[8]

The triumphs of 1888 set off a rapid and widespread adoption of the Australian system in the United States. By 1896,

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[8] Similar results were achieved with the Massachusetts law:

"Quiet, order, and cleanliness reign in and about the polling-places. I have visited precincts where, under the old system, coats were torn off the backs of voters, where ballots of one kind have been snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots; and under the new system all was orderly and peaceable." 2 Annals of the American Academy of Political and Social Science 738 (1892).

almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate. See Rusk 30–31. See also Albright 26–28; Evans 27; *post*, at 215, n. 1 (SCALIA, J., concurring in judgment) (citations to statutes passed before 1900).

The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform. Tennessee passed the first relevant provision in 1890 as part of its switch to an Australian system. In its effort to "secur[e] the purity of elections," Tennessee provided that only voters and certain election officials were permitted within the room where the election was held or within 50 feet of the entrance. The Act did not provide any penalty for violation and applied only in the more highly populated counties and cities. 1890 Tenn. Pub. Acts, ch. 24, §§ 12 and 13.

The second relevant provision was passed in 1901 as an amendment to Tennessee's "Act to preserve the purity of elections, and define and punish offenses against the elective franchise." The original Act, passed in 1897, made it a misdemeanor to commit various election offenses, including the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure. 1897 Tenn. Pub. Acts, ch. 14. The 1901 amendment made it a misdemeanor for any person, except the officers holding the elections, to approach nearer than 30 feet to any voter or ballot box. This provision applied to all Tennessee elections. 1901 Tenn. Pub. Acts, ch. 142.

These two laws remained relatively unchanged until 1967, when Tennessee added yet another proscription to its secret ballot law. This amendment prohibited the distribution of campaign literature "on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress." 1967 Tenn. Pub. Acts, ch. 85.

In 1972, the State enacted a comprehensive code to regulate the conduct of elections. The code included a section that proscribed the display and the distribution of campaign

material and the solicitation of votes within 100 feet of the entrance to a polling place. The 1972 "campaign-free zone" is the direct precursor of the restriction challenged in the present litigation.

Today, all 50 States limit access to the areas in or around polling places. See App. to Pet. for Cert. 26a–50a; Note, Defoliating the Grassroots: Election Day Restrictions on Political Speech, 77 Geo. L. J. 2137 (1989) (summarizing statutes as of 1989). The National Labor Relations Board also limits activities at or near polling places in union-representation elections.[9]

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Respondent and the dissent advance three principal challenges to this conclusion. First, respondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. See, *e. g.*, Tenn. Code Ann. §§2–19–101 and 2–19–115 (Supp. 1991). We are not persuaded. Intimidation and interference laws fall short of serving a State's compelling interests because they "deal

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[9] See, *e. g.*, *Season-All Industries, Inc.* v. *NLRB*, 654 F. 2d 932 (CA3 1981); *NLRB* v. *Carroll Contracting and Ready-Mix, Inc.*, 636 F. 2d 111 (CA5 1981); *Midwest Stock Exchange, Inc.* v. *NLRB*, 620 F. 2d 629 (CA7), cert. denied, 449 U. S. 873 (1980); *Michem, Inc.*, 170 N. L. R. B. 362 (1968); *Claussen Baking Co.*, 134 N. L. R. B. 111 (1961).

with only the most blatant and specific attempts" to impede elections. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 28 (1976) (existence of bribery statute does not preclude need for limits on contributions to political campaigns). Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, see Tenn. Code Ann. §2–7–103 (1985), many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.

Second, respondent and the dissent argue that Tennessee's statute is underinclusive because it does not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone. We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive. In fact, as one early commentator pointed out, allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors. See Wigmore 52. But regardless of the need for such additional monitoring, there is, as summarized above, ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist.

Finally, the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The only way to preserve the

secrecy of the ballot is to limit access to the area around the voter.[10] Accordingly, we hold that *some* restricted zone around the voting area is necessary to secure the State's compelling interest.

The real question then is *how large* a restricted zone is permissible or sufficiently tailored. Respondent and the dissent argue that Tennessee's 100-foot boundary is not narrowly drawn to achieve the State's compelling interest in protecting the right to vote. We disagree.

As a preliminary matter, the long, uninterrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require. The majority of these laws were adopted originally in the 1890's, long before States engaged in extensive legislative hearings on election regulations. The prevalence of these laws, both here and abroad, then encouraged their reenactment without much comment. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.

Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question.

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[10] The logical connection between ballot secrecy and restricted zones distinguishes this case from those cited by the dissent in which the Court struck down longstanding election regulations. In those cases, there was no rational connection between the asserted interest and the regulation. See, *e. g.*, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 666 (1966) ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax").

Munro v. *Socialist Workers Party*, 479 U. S. 189, 195 (1986).[11] Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout.[12] Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud

> "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.*, at 195–196 (emphasis added).

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[11] This modified "burden of proof" does not apply to all cases in which there is a conflict between First Amendment rights and a State's election process—instead, it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i. e.*, cases involving voter confusion from overcrowded ballots, like *Munro*, or cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots. Thus, for example, States must come forward with more specific findings to support regulations directed at intangible "influence," such as the ban on election-day editorials struck down in *Mills* v. *Alabama*, 384 U. S. 214 (1966).

[12] The dissent argues that our unwillingness to require more specific findings is in tension with *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), another case in which there was conflict between two constitutional rights. Trials do not, however, present the same evidentiary or remedial problems. Because the judge is concerned only with the trial before him, it is much easier to make specific findings. And while the remedy of rerunning a trial is an onerous one, it does not suffer from the imperfections of a rescheduled election. Nonetheless, even in the fair trial context, we reaffirmed that, given the importance of the countervailing right, "'our system of law has always endeavored to prevent even the *probability* of unfairness.'" *Id.*, at 352 (quoting *In re Murchison*, 349 U. S. 133, 136 (1955)) (emphasis added).

We do not think that the minor geographic limitation prescribed by §2–7–111(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." *Id.*, at 197. Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, 802 S. W. 2d, at 214, is a difference only in degree, not a less restrictive alternative in kind. *Buckley* v. *Valeo*, 424 U. S., at 30. As was pointed out in the dissenting opinion in the Tennessee Supreme Court, it "takes approximately 15 seconds to walk 75 feet." 802 S. W. 2d, at 215. The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.[13]

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills* v. *Alabama*, 384 U. S. 214 (1966). See also *Meyer* v. *Grant*, 486 U. S. 414 (1988) (invalidating absolute bar against the use of paid circulators). In reviewing challenges to specific provisions of a State's election laws, however, this Court has not employed any "'litmus-paper test'

[13] Respondent also raises two more specific challenges to the tailoring of the Tennessee statute. First, she contends that there may be some polling places so situated that the 100-foot boundary falls in or on the other side of a highway. Second, respondent argues that the inclusion of quintessential public forums in some campaign-free zones could result in the prosecution of an individual for driving by in an automobile with a campaign bumper sticker. At oral argument, petitioner denied that the statute would reach this latter, inadvertent conduct, since this would not constitute "display" of campaign material. Tr. of Oral Arg. 33–35. In any event, these arguments are "as applied" challenges that should be made by an individual prosecuted for such conduct. If successful, these challenges would call for a limiting construction rather than a facial invalidation. In the absence of any factual record to support respondent's contention that the statute has been applied to reach such circumstances, we do not entertain the challenges in this case.

that will separate valid from invalid restrictions." *Anderson* v. *Celebrezze*, 460 U. S., at 789 (quoting *Storer* v. *Brown*, 415 U. S. 724, 730 (1974)). Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.

In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.

The judgment of the Tennessee Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE KENNEDY, concurring.

Earlier this Term, I questioned the validity of the Court's recent First Amendment precedents suggesting that a State may restrict speech based on its content in the pursuit of a compelling interest. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 124–125 (1991) (opinion concurring in judgment). Under what I deem the proper approach, neither a general content-based proscription of speech nor a content-based proscription of speech in a public forum can be justified unless the speech falls within

one of a limited set of well-defined categories. See *ibid.* Today's case warrants some elaboration on the meaning of the term "content based" as used in our jurisprudence.

In *Simon & Schuster*, my concurrence pointed out the seeming paradox that notwithstanding "our repeated statement that 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" *id.*, at 126 (quoting *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972)), we had fallen into the practice of suggesting that content-based limits on speech can be upheld if confined in a narrow way to serve a compelling state interest. I continue to believe that our adoption of the compelling-interest test was accomplished by accident, 502 U. S., at 125, and as a general matter produces a misunderstanding that has the potential to encourage attempts to suppress legitimate expression.

The test may have a legitimate role, however, in sorting out what is and what is not a content-based restriction. See *id.*, at 128 ("[W]e cannot avoid the necessity of deciding . . . whether the regulation is in fact content based or content neutral"). As the Court has recognized in the context of regulations of the time, place, or manner of speech, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)) (emphasis added in *Ward*). In some cases, the fact that a regulation is content based and invalid because outside any recognized category permitting suppression will be apparent from its face. In my view that was true of the New York statute we considered in *Simon & Schuster*, and no further inquiry was necessary. To read the statute was sufficient to strike it down as an effort by government to restrict expression because of its content.

Discerning the justification for a restriction of expression, however, is not always so straightforward as it was, or should have been, in *Simon & Schuster*. In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas. There the compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law. This explanation of the compelling-interest analysis is not explicit in our decisions; yet it does appear that in time, place, and manner cases, the regulation's justification is a central inquiry. See, *e. g.*, *Ward* v. *Rock Against Racism*, *supra*, at 791; *Clark* v. *Community for Creative Non-Violence*, *supra*, at 293; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648–649, and n. 12 (1981). And in those matters we do not apply as strict a requirement of narrow tailoring as in other contexts, *Ward* v. *Rock Against Racism*, *supra*, at 797, although this may be because in cases like *Ward*, *Clark*, and *Heffron*, content neutrality was evident on the face of the regulations once the justification was identified and became itself the object of examination.

The same use of the compelling-interest test is adopted today, not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law. The outcome of that analysis is that the justification for the speech restriction is to protect another constitutional right. As I noted in *Simon & Schuster*, there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. 502 U. S., at 124, 128. That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts

to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression. With these observations, I concur in the opinion of JUSTICE BLACKMUN and the judgment of the Court.

JUSTICE SCALIA, concurring in the judgment.

If the category of "traditional public forum" is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from *tradition.* Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, Tenn. Code Ann. §2–7–111 (Supp. 1991) does not restrict speech in a traditional public forum, and the "exacting scrutiny" that the plurality purports to apply, *ante,* at 198, is inappropriate. Instead, I believe that §2–7–111, though content based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. I therefore concur in the judgment of the Court.

As the plurality correctly notes, the 100-foot zone established by §2–7–111 sometimes encompasses streets and sidewalks adjacent to the polling places. *Ante,* at 196, n. 2. The plurality's determination that §2–7–111 is subject to strict scrutiny is premised on its view that these areas are "quintessential public forums," having "'*by long tradition* . . . been devoted to assembly and debate.'" *Ante,* at 196 (emphasis added). Insofar as areas adjacent to functioning polling places are concerned, that is simply not so. Statutes such as §2–7–111 have an impressively long history of general use. Ever since the widespread adoption of the secret ballot in the late 19th century, viewpoint-neutral restrictions on election-day speech within a specified distance of the polling place—or on physical presence there—have been commonplace, indeed prevalent. By 1900, at least 34 of the 45

States (including Tennessee) had enacted such restrictions.[1] It is noteworthy that most of the statutes banning election-day speech near the polling place specified the same distance set forth in §2–7–111 (100 feet),[2] and it is clear that the re-

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[1] Act of Mar. 3, 1875, No. 18, §95, 1874–1875 Ala. Acts 76, 99; Act of Mar. 4, 1891, No. 30, §39, 1891 Ark. Gen. Acts 32, 48; Act of Mar. 20, 1891, ch. 130, §32.1215, 1891 Cal. Stats. 165, 178; Act of Mar. 26, 1891, §37, 1891 Colo. Sess. Laws 143, 164; Act of June 22, 1889, ch. 247, §13, 1889 Conn. Pub. Acts 155, 158; Act of May 15, 1891, ch. 37, §33, 1891 Del. Laws 85, 100; Act of May 25, 1895, ch. 4328, §39, 1895 Fla. Laws 56, 76; Act of Feb. 25, 1891, §4, 1891 Idaho Sess. Laws 50, 51; Act of June 22, 1891, §28, 1891 Ill. Laws 107, 119; Act of Mar. 6, 1889, ch. 87, §55, 1889 Ind. Acts 157, 182; Act of Apr. 12, 1886, ch. 161, §13, 1886 Iowa Acts 187, 192; Act of Mar. 11, 1893, ch. 78, §26, 1893 Kan. Sess. Laws 106, 120; Act of June 30, 1892, ch. 65, §25, 1891–1892 Ky. Acts 106, 121; Act of Apr. 2, 1896, ch. 202, §103, 1896 Md. Laws 327, 384; Act of Apr. 12, 1895, ch. 275, 1895 Mass. Acts 276; Act of Apr. 21, 1893, ch. 4, §108, 1893 Minn. Laws 16, 51; Act of 1880, ch. 16, §11, 1880 Miss. Gen. Laws 108, 112; Act of May 16, 1889, §35, 1889 Mo. Laws 105, 110; Mont. Code Ann., Title 4, §73 (1895); Act of Mar. 4, 1891, ch. 24, §29, 1891 Neb. Laws 238, 255; Act of Mar. 13, 1891, ch. 40, §30, 1891 Nev. Stats. 40, 46; Act of May 28, 1890, ch. 231, §63, 1890 N. J. Laws 361, 397; Act of May 2, 1890, ch. 262, §35, 1890 N. Y. Laws 482, 494; Act of Mar. 7, 1891, ch. 66, §34, 1891 N. D. Laws 171, 182; Act of May 4, 1885, 1885 Ohio Leg. Acts 232, 235; Act of Feb. 13, 1891, §19, 1891 Ore. Laws 8, 13; Act of Mar. 5, 1891, ch. 57, §35, 1891 S. D. Laws 152, 164; Act of Mar. 11, 1890, ch. 24, §13, 1890 Tenn. Pub. Acts 50, 55; Act of Mar. 28, 1896, ch. 69, §37, 1896 Utah Laws 183, 208; Act of Mar. 6, 1894, ch. 746, §10, 1893–1894 Va. Acts 862, 864; Act of Mar. 19, 1890, ch. 13, §33, 1889–1890 Wash. Laws 400, 412; Act of Mar. 11, 1891, ch. 89, §79, 1891 W. Va. Acts 226, 257; Act of Apr. 3, 1889, ch. 248, §36, 1889 Wis. Laws 253, 267; Act of Jan. 1, 1891, ch. 100, 1890 Wyo. Sess. Laws 392.

[2] *E. g.*, Act of Mar. 4, 1891, No. 30, §39, 1891 Ark. Gen. Acts 32, 48; Act of Mar. 20, 1891, ch. 130, §1215, 1891 Cal. Stats. 165, 178; Act of Mar. 26, 1891, §37, 1891 Colo. Sess. Laws 143, 164; Act of June 22, 1889, ch. 247, §13, 1889 Conn. Pub. Acts 155, 158; Act of Feb. 25, 1891, §4, 1890 Idaho Sess. Laws 50, 51; Act of June 22, 1891, §28, 1891 Ill. Laws 107, 119; Act of Apr. 12, 1886, ch. 161, §13, 1886 Iowa Acts 187, 192; Act of Mar. 11, 1893, ch. 78, §26, 1893 Kan. Sess. Laws 106, 120; Act of Apr. 2, 1896, ch. 202, §103, 1896 Md. Laws 327, 384; Act of May 16, 1889, §35, 1889 Mo. Laws 105, 110; Act of Mar. 4, 1891, ch. 24, §29, 1891 Neb. Laws 238, 255; Act of Mar. 13, 1891, ch. 40, §30, 1891 Nev. Stats. 40, 46; Act of May 28,

stricted zones often encompassed streets and sidewalks. Thus, the streets and sidewalks around polling places have traditionally *not* been devoted to assembly and debate.

Nothing in the public forum doctrine or in this Court's precedents warrants disregard of this longstanding tradition. "Streets and sidewalks" are not public forums *in all places*, see *Greer* v. *Spock*, 424 U. S. 828 (1976) (streets and sidewalks on military base are not a public forum), and the long usage of our people demonstrates that the portions of streets and sidewalks adjacent to polling places are not public forums *at all times* either. This unquestionable tradition could be accommodated, I suppose, by holding laws such as § 2–7–111 to be covered by our doctrine of permissible "time, place, and manner" restrictions upon public forum speech—which doctrine is itself no more than a reflection of our traditions, see *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). The problem with this approach, however, is that it would require some expansion of (or a unique exception to) the "time, place, and manner" doctrine, which does not permit restrictions that are not content neutral (§ 2–7–111 prohibits only electioneering speech). *Ibid.* It is doctrinally less confusing to acknowledge that the environs of a polling place, on election day, are simply not a "traditional public forum"—which means that they are subject to speech restrictions that are reasonable and viewpoint neutral. *Id.*, at 46.

For the reasons that the plurality believes § 2–7–111 survives exacting scrutiny, *ante*, at 198–211, I believe it is at least reasonable; and respondent does not contend that it is viewpoint discriminatory. I therefore agree with the judgment of the Court that § 2–7–111 is constitutional.

1890, ch. 231, § 63, 1890 N. J. Laws 361, 397; Act of May 4, 1885, 1885 Ohio Leg. Acts 232, 235; Act of Mar. 28, 1896, ch. 69, § 37, 1896 Utah Laws 183, 208; Act of Apr. 3, 1889, ch. 248, § 36, 1889 Wis. Laws 253, 267.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, dissenting.

The speech and conduct prohibited in the campaign-free zone created by Tenn. Code Ann. §2–7–111 (Supp. 1991) is classic political expression. As this Court has long recognized, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976) (citation omitted). Therefore, I fully agree with the plurality that Tennessee must show that its "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Ante*, at 198 (citations omitted). I do not agree, however, that Tennessee has made anything approaching such a showing.

I

Tennessee's statutory "campaign-free zone" raises constitutional concerns of the first magnitude. The statute directly regulates political expression and thus implicates a core concern of the First Amendment. Moreover, it targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers) and thus regulates expression based on its content. In doing so, the Tennessee statute somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate. For these reasons, Tennessee unquestionably bears the heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest.

Statutes creating campaign-free zones outside polling places serve two quite different functions—they protect or-

derly access to the polls and they prevent last-minute campaigning. There can be no question that the former constitutes a compelling state interest and that, in light of our decision in *Mills* v. *Alabama*, 384 U. S. 214 (1966), the latter does not. Accordingly, a State must demonstrate that the particular means it has fashioned to ensure orderly access to the polls do not unnecessarily hinder last-minute campaigning.

Campaign-free zones are noteworthy for their broad, antiseptic sweep. The Tennessee zone encompasses at least 30,000 square feet around each polling place; in some States, such as Kentucky and Wisconsin, the radius of the restricted zone is 500 feet—silencing an area of over 750,000 square feet. Even under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require the clearing of hundreds of thousands of square feet simply to ensure that the path to the polling-place door remains open and that the curtain that protects the secrecy of the ballot box remains closed.

The fact that campaign-free zones cover such a large area in some States unmistakably identifies censorship of election-day campaigning as an animating force behind these restrictions. That some States have no problem maintaining order with zones of 50 feet or less strongly suggests that the more expansive prohibitions are not necessary to maintain access and order. Indeed, on its face, Tennessee's statute appears informed by political concerns. Although the statute initially established a 100-foot zone, it was later amended to establish a 300-foot zone in 12 of the State's 95 counties. As the State Attorney General observed, "there is not a rational basis" for this special treatment, for there is no "discernable reason why an extension of the boundary . . . is necessary in" those 12 counties. Brief in Opposition 4a, Tenn. Op. Atty. Gen. No. 87–185.

Moreover, the Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the simple

"display of campaign posters, signs, or other campaign materials." §2–7–111(b). Bumper stickers on parked cars and lapel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.

The evidence introduced at trial to demonstrate the necessity for Tennessee's campaign-free zone was exceptionally thin. Although the State's sole witness explained the need for special restrictions *inside* the polling place itself, she offered no justification for a ban on political expression *outside* the polling place.[1] On this record it is far from surprising that the Tennessee Supreme Court—which surely is more familiar with the State's electoral practices and traditions than we are—concluded that the 100-foot ban outside the polling place was not justified by regulatory concerns. This conclusion is bolstered by Tennessee law, which indicates that normal police protection is completely adequate to maintain order in the area more than *10* feet from the polling place.[2]

Perhaps in recognition of the poverty of the record, the plurality—without briefing, or legislative or judicial fact-finding—looks to history to assess whether Tennessee's stat-

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[1] See 802 S. W. 2d 210, 213 (Tenn. 1990) ("The specific testimony of the State's witness about confusion, error, overcrowding, etc. concerned the numbers of persons present in the polling place itself, not the numbers of persons outside the polls").

[2] Within the polling place itself, and within 10 feet of its entrance, a prohibition against the presence of nonvoters is justified, in part by the absence of normal police protection. Section 2–7–103(c) provides:

"No policeman or other law-enforcement officer may come nearer to the entrance to a polling place than ten feet (10′) or enter the polling place except at the request of the officer of elections or the county election commission or to make an arrest or to vote."

There is, however, no reason to believe that the Tennessee Legislature regarded the normal protection against disruptive conduct outside that 10-foot area as insufficient to guarantee orderly access.

ute is in fact necessary to serve the State's interests. From its review of the history of electoral reform, the plurality finds that

> "all 50 States . . . settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that *some* restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." *Ante*, at 206 (emphasis added).

This analysis is deeply flawed; it confuses history with necessity, and mistakes the traditional for the indispensable. The plurality's reasoning combines two logical errors: First, the plurality assumes that a practice's long life itself establishes its necessity; and second, the plurality assumes that a practice that was once necessary remains necessary until it is ended.[3]

With regard to the first, the fact that campaign-free zones were, as the plurality indicates, introduced as part of a broader package of electoral reforms does not demonstrate that such zones were *necessary*. The abuses that affected the electoral system could have been cured by the institution of the secret ballot and by the heightened regulation of the polling place alone, without silencing the political speech *outside* the polling place.[4] In my opinion, more than mere timing is required to infer necessity from tradition.

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[3] I leave it to historians to review the substantive accuracy of the plurality's narrative, for I find more disturbing the plurality's *use* of history.

[4] The plurality's suggestion that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter," *ante*, at 207–208, is specious. First, there are obvious and simple means of preserving voter secrecy (*e. g.*, opaque doors or curtains on the voting booth) that do not involve the suppression of political speech. Second, there is no disagreement that the restrictions on campaigning *within the polling place* are constitutional; the issue is not whether the State may limit access to the "area *around the voter*" but whether the State may limit speech in the area *around the polling place*.

We have never regarded tradition as a proxy for necessity where necessity must be demonstrated. To the contrary, our election-law jurisprudence is rich with examples of traditions that, though longstanding, were later held to be unnecessary. For example, "[m]ost of the early Colonies had [poll taxes]; many of the States have had them during much of their histories . . . ." *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663, 684 (1966) (Harlan, J., dissenting). Similarly, substantial barriers to candidacy, such as stringent petition requirements, see *Williams* v. *Rhodes*, 393 U. S. 23 (1968), property-ownership requirements, see *Turner* v. *Fouche*, 396 U. S. 346 (1970), and onerous filing fees, see *Lubin* v. *Panish*, 415 U. S. 709 (1974), were all longstanding features of the electoral labyrinth.

In fact, two of our most noted decisions in this area involve, as does this case, Tennessee's electoral traditions. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), which invalidated Tennessee's 1-year residency requirement, is particularly instructive. Tennessee's residency requirement was indisputably "traditional," having been in place since 1870. App. in *Dunn* v. *Blumstein*, O. T. 1971, No. 13, p. 22. As in this case, the State defended its law on the basis of its interest in "'secur[ing] the freedom of elections and the purity of the ballot box.'" *Id.*, at 23. Again like this case, *Dunn* involved a conflict between two rights—the right to travel and the right to vote. The Court applied strict scrutiny, ruling that residency requirements are "unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.'" 405 U. S., at 342 (emphasis in original) (citation omitted). Although we recognized that "[p]reservation of the 'purity of the ballot box' is a formidable-sounding state interest," *id.*, at 345, we rejected the State's argument that a 1-year requirement was necessary to promote that interest. In doing so, we did not even mention, let alone find determinative, the fact that Tennessee's requirement was more than 100 years old.

In *Baker* v. *Carr*, 369 U. S. 186 (1962), we addressed the apportionment of Tennessee's Legislature. The State's apportionment regime had remained unchanged since 1901 and was such that, by the time of trial, "40% of the voters elect[ed] 63 of the 99 members of the [state] House" of Representatives. *Id.*, at 253 (Clark, J., concurring). Although, as Justice Frankfurter observed in dissent, "'very unequal' representation" had been a feature of the Nation's political landscape since colonial times, *id.*, at 307–318, the Court was not bound by this long tradition. Our other cases resemble *Dunn* and *Baker* in this way: Never have we indicated that tradition was synonymous with necessity.

Even if we assume that campaign-free zones were once somehow "necessary," it would not follow that, 100 years later, those practices remain necessary. Much in our political culture, institutions, and practices has changed since the turn of the century: Our elections are far less corrupt, far more civil, and far more democratic today than 100 years ago. These salutary developments have substantially eliminated the need for what is, in my opinion, a sweeping suppression of core political speech.

Although the plurality today blithely dispenses with the need for factual findings to determine the necessity of "traditional" restrictions on speech, courts that have made such findings with regard to other campaign-free zones have, without exception, found such zones unnecessary. See, *e. g.*, *Florida Comm. for Liability Reform* v. *McMillan*, 682 F. Supp. 1536, 1541–1542 (MD Fla. 1988); *Clean-Up '84* v. *Heinrich*, 582 F. Supp. 125 (MD Fla. 1984), aff'd, 759 F. 2d 1511 (CA11 1985). Likewise, courts that have invalidated similar restrictions on so-called "exit polling" by the news media have, after careful factfinding, also declined to find such prohibitions "necessary." See, *e. g.*, *Firestone* v. *News-Press Publishing Co.*, 538 So. 2d 457, 459 (Fla. 1989) (invalidating Florida's 50-foot zone to the extent that it reaches outside the polling room and noting that "[a]t the evidentiary

hearing, no witnesses testified of any disturbances having occurred within fifty feet of the polling room. . . . The state's unsubstantiated concern of potential disturbance is not sufficient to overcome the chilling effect on first amendment rights"); *Daily Herald Co.* v. *Munro*, 838 F. 2d 380, 385, n. 8 (CA9 1988) (observing with regard to Washington's 300-foot zone that "'[t]here isn't one iota of testimony about a single voter that was upset, or intimidated, or threatened'" (quoting trial transcript)); *National Broadcasting Co.* v. *Cleland*, 697 F. Supp. 1204, 1211–1212 (ND Ga. 1988); *CBS Inc.* v. *Smith*, 681 F. Supp. 794, 803 (SD Fla. 1988). All of these courts, having received evidence on this issue, were far better situated than we are to assess the contemporary necessity of campaign-free zones. All of these courts concluded that such suppression of expression is unnecessary, suggesting that such zones were something of a social atavism. To my mind, this recent history, developed in the context of an adversarial search for the truth, indicates that, whatever the original historical basis for campaign-free zones may have been, their continued "necessity" has not been established. Especially when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well.

II

In addition to sweeping too broadly in its reach, Tennessee's campaign-free zone selectively prohibits speech based on content. Like the statute the Court found invalid in *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 785 (1978), the Tennessee statute regulates "the subjects about which persons may speak and the speakers who may address a public issue." Within the zone, §2–7–111 silences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerning issues or candidates not on the day's ballot. Indeed, as I read it, §2–7–111 does not prohibit exit polling, which surely presents at least as

great a potential interference with orderly access to the polls as does the distribution of campaign leaflets, the display of campaign posters, or the wearing of campaign buttons. This discriminatory feature of the statute severely undercuts the credibility of its purported law-and-order justification.

Tennessee's content-based discrimination is particularly problematic because such a regulation will inevitably favor certain groups of candidates. As the testimony in this case illustrates, several groups of candidates rely heavily on last-minute campaigning. See App. 22–23. Candidates with fewer resources, candidates for lower visibility offices, and "grassroots" candidates benefit disproportionately from last-minute campaigning near the polling place. See Note, Defoliating the Grassroots: Election Day Restrictions on Political Speech, 77 Geo. L. J. 2137, 2158–2160 (1989) (collecting authorities).

Although the plurality recognizes that the Tennessee statute is content based, see *ante*, at 197–198, it does not inquire into whether that discrimination itself is related to any purported state interest. To the contrary, the plurality makes the surprising and unsupported claim that the selective regulation of protected speech is justified because, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Ante*, at 207. Yet earlier this Term, the Court rejected an asserted state interest because that interest "ha[d] nothing to do with the State's" content-based distinctions among expressive activities. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 120 (1991); see also *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 231 (1987). Similarly in *Carey* v. *Brown*, 447 U. S. 455, 464–465 (1980), the Court acknowledged Illinois' interest in "residential privacy" but invalidated that State's ban on picketing because its distinction between labor and nonlabor picketing could not be "justified by reference to the State's interest in maintaining domestic tranquility."

In this case the same is true: Tennessee's differential treatment of campaign speech furthers no asserted state interest. Access to, and order around, the polls would be just as threatened by the congregation of citizens concerned about a local environmental issue not on the ballot as by the congregation of citizens urging election of their favored candidate. Similarly, assuming that disorder immediately outside the polling place could lead to the commission of errors or the perpetration of fraud, such disorder could just as easily be caused by a religious dispute sparked by a colporteur as by a campaign-related dispute sparked by a campaign worker. In short, Tennessee has failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression.

III

Although the plurality purports to apply "exacting scrutiny," its three marked departures from that familiar standard may have greater significance for the future than its precise holding about campaign-free zones. First, the plurality declines to take a hard look at whether a state law is in fact "necessary." Under the plurality's analysis, a State need not demonstrate that contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition.[5]

Second, citing *Munro* v. *Socialist Workers Party*, 479 U. S. 189 (1986), the plurality lightens the State's burden of proof in showing that a restriction on speech is "narrowly tai-

[5] The plurality emphasizes that this case "force[s] us to reconcile our commitment to free speech with our commitment to other constitutional rights." *Ante*, at 198 (citing *Sheppard* v. *Maxwell*, 384 U. S. 333, 361–363 (1966)). Although I agree with the plurality on this matter, this characterization of the controversy does not compel (or even indicate) deference to tradition. Indeed in *Sheppard* itself, the Court did not defer to tradition or established practices, but rather imposed on "appellate tribunals . . . the duty to make an independent evaluation of the circumstances" of every case. *Id.*, at 362.

lored." In *Munro*, we upheld a Washington ballot-access law and, in doing so, observed that we would not "requir[e] a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Id.*, at 194–195. We stated that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.*, at 195–196. I have substantial doubts about the plurality's extension of *Munro*'s reasoning to this case, most fundamentally because I question the plurality's assumption that campaign-free zones do "not significantly impinge on constitutionally protected rights." Not only is this the very question before us, but in light of the sweep of such zones and the vital First Amendment interests at stake, I do not know how that assumption can be sound.

Third, although the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation, *ante*, at 197–198, it nonetheless upholds the statute because "there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place, *ante*, at 207. This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State*. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

In sum, what the plurality early in its opinion calls "exacting scrutiny," *ante*, at 198, appears by the end of its analysis to be neither exacting nor scrutiny. To borrow a mixed metaphor, the plurality's scrutiny is "toothless." *Mathews* v. *Lucas*, 427 U. S. 495, 510 (1976).

IV

Ours is a Nation rich with traditions. Those traditions sometimes support, and sometimes are superseded by, constitutional rules. By tradition, for example, Presidential campaigns end on election eve; yet Congress certainly could not enforce that tradition by enacting a law proscribing campaigning on election day. At one time as well, bans on election-day editorial endorsements were traditional in some States,[6] but *Mills* v. *Alabama*, 384 U. S. 214 (1966), established that such bans are incompatible with the First Amendment.

In *Mills*, we set aside the conviction of a newspaper editor who violated such a ban. In doing so, we declined to accept the State's analogy between the electoral process and the judicial process, and its claim that the State could, on election day, insulate voters from political sentiments and ideas much the same way as a jury is sequestered.[7] We squarely rejected the State's claim that its ban was justified by the need to protect the public "'from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day.'" *Id.*, at 219 (quoting *State* v. *Mills*, 278 Ala. 188, 195–196, 176 So. 2d 884, 890 (1965)). To the contrary, we recognized that it is precisely *on election day* that advocacy and campaigning "can be most effective." *Mills*, 384 U. S., at 219. *Mills* stands for the simple proposition that, tradition notwithstanding, the State does not have a legitimate interest in insulating voters from election-day campaigning. Thus, in

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[6] See, *e. g.*, 1913 Mont. Laws § 34, pp. 590, 607; 1911 N. D. Laws, ch. 129, § 16, pp. 210, 214; 1909 Ore. Laws, ch. 3, § 34, pp. 15, 29.

[7] "The idea behind [the ban on endorsements] was to prevent the voters from being subjected to unfair pressure and 'brainwashing' on the day when their minds should remain clear and untrammeled by such influences, just as this court is insulated against further partisan advocacy once these arguments are submitted." Brief for Appellee, O. T. 1965, No. 597, p. 9.

light of *Mills*, the fact that campaign-free zones are "traditional" tends to undermine, rather than to support, the validity of the Tennessee statute. In short, we should scrutinize the Tennessee statute for what it is—a police power regulation that also silences a substantial amount of protected political expression.

In my opinion, the presence of campaign workers outside a polling place is, in most situations, a minor nuisance. But we have long recognized that "'the fact that society may find speech offensive is not a sufficient reason for suppressing it.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988) (citation omitted). Although we often pay homage to the electoral process, we must be careful not to confuse sanctity with silence. The hubbub of campaign workers outside a polling place may be a nuisance, but it is also the sound of a vibrant democracy.

In silencing that sound, Tennessee "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer* v. *Grant*, 486 U. S. 414, 425 (1988) (citation omitted). For that reason, Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary to protect orderly access to the polls. It has not done so.

I therefore respectfully dissent.

Syllabus

UNITED STATES *v.* BURKE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91–42. Argued January 21, 1992—Decided May 26, 1992

As part of the settlement of a sex discrimination claim under Title VII of the Civil Rights Act of 1964, the Tennessee Valley Authority (TVA) paid backpay to affected employees, including respondents, from which it withheld federal income taxes. The Internal Revenue Service (IRS) disallowed respondents' claims for refund of the withheld taxes. In a subsequent refund action, the District Court ruled that, since respondents had obtained only backpay due them as a result of TVA's discriminatory underpayments rather than compensatory or other damages, the settlement proceeds could not be excluded from their gross incomes as "damages received . . . on account of personal injuries" under 26 U. S. C. § 104(a)(2). The Court of Appeals reversed, holding that TVA's discrimination constituted a personal, tort-like injury to respondents, and rejecting the Government's attempt to distinguish Title VII, which authorizes no compensatory or punitive damages, from other statutes thought to redress personal injuries.

Held: Backpay awards in settlement of Title VII claims are not excludable from gross income under § 104(a)(2). Pp. 233–242.

(a) IRS regulations formally link identification of a "personal injury" for purposes of § 104(a)(2) to traditional tort principles, referring to "prosecution of a legal suit or action based upon tort or tort type rights." 26 CFR § 1.104–1(c). In order to fall within the § 104(a)(2) exclusion, respondents must show that Title VII, the legal basis for their recovery of backpay, redresses a tort-like personal injury. Pp. 233–234.

(b) A hallmark of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff for harm sustained. Title VII, however, permits the award of only backpay and other injunctive relief. Congress sought through Title VII to restore victims to the wage and employment positions they would have occupied absent discrimination, but declined, in contrast to other federal antidiscrimination statutes, to recompense victims for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages. Thus, Title VII cannot be said to redress a tort-like personal injury within the meaning of § 104(a)(2) and the applicable regulations. Pp. 234–242.

929 F. 2d 1119, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined. SCALIA, J., *post*, p. 242, and SOUTER, J., *post*, p. 246, filed opinions concurring in the judgment. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 248.

Jeffrey P. Minear argued the cause for the United States. On the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Kent L. Jones, Ann Belanger Durney,* and *Bruce R. Ellisen.*

Joseph E. Finley argued the cause for respondents. With him on the brief was *Lucinda M. Finley.**

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we decide whether a payment received in settlement of a backpay claim under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, is excludable from the recipient's gross income under § 104(a)(2) of the federal Internal Revenue Code, 26 U. S. C. § 104(a)(2), as "damages received . . . on account of personal injuries."

I

The relevant facts are not in dispute. In 1984, Judy A. Hutcheson, an employee of the Tennessee Valley Authority (TVA), filed a Title VII action in the United States District

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*Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Steven S. Zaleznick, Cathy Ventrell-Monsees, Raymond C. Fay,* and *Thomas F. Joyce;* for the American Civil Liberties Union et al. by *C. Cabell Chinnis, Jr., Alison C. Wetherfield, Martha F. Davis, Steven R. Shapiro, Isabelle Katz Pinzler, Julius L. Chambers,* and *Charles Stephen Ralston;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* for Equal Rights Advocates, Inc., by *Stephen V. Bomse, Nancy L. Davis,* and *Maria Blanco;* for Women Employed et al. by *Michael B. Erp, Mary K. O'Melveny,* and *Stephen G. Seliger;* for the National Employment Lawyers Association by *Robert B. Fitzpatrick;* and for the National Women's Law Center by *Walter J. Rockler.*

Raymond C. Fay, Alan M. Serwer, and *Thomas F. Joyce* filed a brief for the United Airlines Pilot Group as *amicus curiae.*

Court for the Eastern District of Tennessee alleging that TVA had discriminated unlawfully in the payment of salaries on the basis of sex. The Office and Professional Employees International Union, which represented the affected employees, intervened. Among the represented employees were respondents Therese A. Burke, Cynthia R. Center, and Linda G. Gibbs.

The complaint alleged that TVA had increased the salaries of employees in certain male-dominated pay schedules, but had not increased the salaries of employees in certain female-dominated schedules. In addition, the complaint alleged that TVA had lowered salaries in some female-dominated schedules. App. in No. 90–5607 (CA6) (hereinafter App.), pp. 28–32 (Second Amended Complaint). The plaintiffs sought injunctive relief as well as backpay for all affected female employees. *Id.*, at 33–34. The defendants filed a counterclaim against the union alleging, among other things, fraud, misrepresentation, and breach of contract. *Id.*, at 35.

After the District Court denied cross-motions for summary judgment, the parties reached a settlement. TVA agreed to pay $4,200 to Hutcheson and a total of $5 million for the other affected employees, to be distributed under a formula based on length of service and rates of pay. *Id.*, at 70–71, 76–77. Although TVA did not withhold taxes on the $4,200 for Hutcheson, it did withhold, pursuant to the agreement, federal income taxes on the amounts allocated to the other affected employees, including the three respondents here.[1]

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[1] The pretax figures for the three respondents ranged from $573 to $928; the federal income tax withheld ranged from $114 to $186. 90–1 USTC ¶ 50,203, p. 83,747 (1990). Although respondents also sought a refund of taxes withheld from their incomes pursuant to the Federal Insurance Contributions Act (FICA), 26 U. S. C. § 3101 *et seq.*, neither the parties nor the courts below addressed the distinct analytical question whether backpay received under Title VII constitutes "wages" subject to taxation for FICA purposes. See 26 U. S. C. § 3101(a) (imposing percentage tax on "wages"), § 3121(a) (defining "wages" as "all remuneration for employ-

Respondents filed claims for refund of the taxes withheld from the settlement payments. The Internal Revenue Service (IRS) disallowed those claims. Respondents then brought a refund action in the United States District Court for the Eastern District of Tennessee, claiming that the settlement payments should be excluded from their respective gross incomes under § 104(a)(2) of the Internal Revenue Code as "damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." The District Court ruled that, because respondents sought and obtained only back wages due them as a result of TVA's discriminatory underpayments rather than compensatory or other damages, the settlement proceeds could not be excluded from gross income as "damages received . . . on account of personal injuries." 90–1 USTC ¶ 50,203 (1990).

The United States Court of Appeals for the Sixth Circuit, by a divided vote, reversed. 929 F. 2d 1119 (1991). The Court of Appeals concluded that exclusion under § 104(a)(2) turns on whether the injury and the claim are "personal and tort-like in nature." *Id.*, at 1121. "If the answer is in the affirmative," the court held, "then that is the beginning and end of the inquiry." *Id.*, at 1123 (internal quotation marks omitted). The court concluded that TVA's unlawful sex discrimination constituted a personal, tort-like injury to respondents, and rejected the Government's attempt to distinguish Title VII, which authorizes no compensatory or punitive damages,[2] from other statutes thought to redress personal injuries. See *id.*, at 1121–1123. Thus, the court held, the award of backpay pursuant to Title VII was excludable from gross income under § 104(a)(2).

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ment"). Hence, we confine our analysis in this case to the federal income tax question.

[2]The Civil Rights Act of 1991 recently amended Title VII to authorize the recovery of compensatory and punitive damages in certain circumstances. See nn. 8 and 12, *infra*.

The dissent in the Court of Appeals, 929 F. 2d, at 1124, took the view that the settlement of respondents' claims for earned but unpaid wage differentials—wages that would have been paid and would have been subjected to tax absent TVA's unlawful discrimination—did not constitute compensation for "loss due to a tort," as required under § 104(a)(2). See *id.*, at 1126.

We granted certiorari to resolve a conflict among the Courts of Appeals concerning the exclusion of Title VII backpay awards from gross income under § 104(a)(2).[3] 502 U. S. 806 (1991).

II

A

The definition of gross income under the Internal Revenue Code sweeps broadly. Section 61(a), 26 U. S. C. § 61(a), provides that "gross income means all income from whatever source derived," subject only to the exclusions specifically enumerated elsewhere in the Code. As this Court has recognized, Congress intended through § 61(a) and its statutory precursors to exert "the full measure of its taxing power," *Helvering* v. *Clifford*, 309 U. S. 331, 334 (1940), and to bring within the definition of income any "accessio[n] to wealth." *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431 (1955). There is no dispute that the settlement awards in this case would constitute gross income within the reach of § 61(a). See Brief for Respondents 9–10.

The question, however, is whether the awards qualify for special exclusion from gross income under § 104(a), which

[3] Compare the Sixth Circuit's opinion in this case with *Sparrow* v. *Commissioner*, 292 U. S. App. D. C. 259, 949 F. 2d 434 (1991) (Title VII backpay awards not excludable), and *Thompson* v. *Commissioner*, 866 F. 2d 709 (CA4 1989) (same). See also *Johnston* v. *Harris County Flood Control Dist.*, 869 F. 2d 1565, 1579–1580 (CA5 1989) (noting, for purposes of district court consideration of tax liability in computing damages, that Title VII backpay awards may not be excluded under § 104(a)(2)), cert. denied, 493 U. S. 1019 (1990).

provides in relevant part that "gross income does not include—"

> "(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness . . . ."[4]

Neither the text nor the legislative history of § 104(a)(2) offers any explanation of the term "personal injuries."[5] Since 1960, however, IRS regulations formally have linked identification of a personal injury for purposes of § 104(a)(2) to traditional tort principles: "The term 'damages received (whether by suit or agreement)' means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 CFR § 1.104–1(c) (1991). See *Threlkeld* v. *Commissioner*, 87 T. C. 1294, 1305 (1986) ("The essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor. . . . As a result, common law tort law concepts are helpful in deciding whether a taxpayer is being compensated for a 'personal injury'") (internal quotation marks omitted), aff'd, 848 F. 2d 81 (CA6 1988).

A "tort" has been defined broadly as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 2 (1984). Remedial principles thus figure prominently in the definition and conceptualization of torts.

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[4] Section 104, entitled "Compensation for injuries or sickness," provides similar exclusions from gross income for amounts received for personal injuries or sickness under worker's compensation programs (§ 104(a)(1)), accident or health insurance (§ 104(a)(3)), and certain federal pension programs (§ 104(a)(4)).

[5] See, *e. g.*, H. R. Rep. No. 1337, 83d Cong., 2d Sess., 15 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 15–16 (1954).

See R. Heuston, Salmond on the Law of Torts 9 (12th ed. 1957) (noting that "an action for damages" is "an essential characteristic of every true tort," and that, even where other relief, such as an injunction, may be available, "in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort"). Indeed, one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff "fairly for injuries caused by the violation of his legal rights." *Carey* v. *Piphus*, 435 U. S. 247, 257 (1978). Although these damages often are described in compensatory terms, see *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 306 (1986), in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury that are "deemed important, even though not pecuniary in [their] immediate consequence[s]." D. Dobbs, Law of Remedies 136 (1973). Cf. *Molzof* v. *United States*, 502 U. S. 301, 306–307 (1992) (compensatory awards that exceed actual loss are not prohibited as "punitive" damages under the Federal Tort Claims Act).

For example, the victim of a physical injury may be permitted, under the relevant state law, to recover damages not only for lost wages, medical expenses, and diminished future earning capacity on account of the injury, but also for emotional distress and pain and suffering. See Dobbs, at 540–551; *Threlkeld* v. *Commissioner*, 87 T. C., at 1300. Similarly, the victim of a "dignitary" or nonphysical tort[6] such as defa-

[6] Although the IRS briefly interpreted § 104(a)(2)'s statutory predecessor, § 213(b)(6) of the Revenue Act of 1918, 40 Stat. 1066, to restrict the scope of personal injuries to physical injuries, see S. 1384, 2 Cum. Bull. 71 (1920) (determining, on basis of statutory text and "history of the legislation" that "it appears more probable . . . that the term 'personal injuries,' as used therein means physical injuries only"); Knickerbocker, The Income Tax Treatment of Damages, 47 Cornell L. Q. 429, 431 (1962), the courts and the IRS long since have recognized that § 104(a)(2)'s reference to "personal injuries" encompasses, in accord with common judicial parlance and con-

mation may recover not only for any actual pecuniary loss (*e. g.*, loss of business or customers), but for "impairment of reputation and standing in the community, personal humilia-

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ceptions, see Black's Law Dictionary 786 (6th ed. 1990); 1 S. Speiser, C. Krause, & A. Gans, American Law of Torts 6 (1983), nonphysical injuries to the individual, such as those affecting emotions, reputation, or character, as well. See, *e. g.*, *Rickel* v. *Commissioner*, 900 F. 2d 655, 658 (CA3 1990) (noting that "it is judicially well-established that the meaning of 'personal injuries' in this context encompasses both nonphysical as well as physical injuries"); *Roemer* v. *Commissioner*, 716 F. 2d 693, 697 (CA9 1983) (noting that § 104(a)(2) "says nothing about physical injuries," and that "[t]he ordinary meaning of a personal injury is not limited to a physical one"); Rev. Rule 85–98, 1985–2 Cum. Bull. 51 (holding that the § 104(a)(2) exclusion "makes no distinction between physical or emotional injuries"); 1972–2 Cum. Bull. 3, acquiescing in *Seay* v. *Commissioner*, 58 T. C. 32, 40 (1972) (holding that damages received for "personal embarrassment," "mental strain," and injury to "personal reputation" may be excluded under § 104(a)(2), and noting prior rulings regarding alienation of affections and defamation). See also B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts 13–11 (2d ed. 1989); Burke & Friel, Tax Treatment of Employment-Related Personal Injury Awards, 50 Mont. L. Rev. 13, 21 (1989).

Congress' 1989 amendment to § 104(a)(2) provides further support for the notion that "personal injuries" includes physical as well as nonphysical injuries. Congress rejected a bill that would have limited the § 104(a)(2) exclusion to cases involving "physical injury or physical sickness." See H. R. Rep. No. 101–247, pp. 1354–1355 (1989) (describing proposed § 11641 of H. R. 3299, 101st Cong., 1st Sess. (1989)). At the same time, Congress amended § 104(a) to allow the exclusion of *punitive* damages only in cases involving "physical injury or physical sickness." Pub. L. 101–239, § 7641(a), 103 Stat. 2379, 26 U. S. C. § 104(a) (1988 ed., Supp. I). The enactment of this limited amendment addressing only punitive damages shows that Congress assumed that other damages (*i. e.*, compensatory) would be excluded in cases of both physical *and* nonphysical injury.

Notwithstanding JUSTICE SCALIA's contention in his separate opinion that the term "personal injuries" must be read as limited to "health"-related injuries, see *post*, at 244, the foregoing authorities establish that § 104(a)(2) in fact encompasses a broad range of physical and nonphysical injuries to personal interests. JUSTICE SCALIA implicitly acknowledges that the plain meaning of the statutory phrase can support this well-established view. See *post*, at 243–244.

tion, and mental anguish and suffering." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). See also Dobbs, at 510–520. Furthermore, punitive or exemplary damages are generally available in those instances where the defendant's misconduct was intentional or reckless. See *id.*, at 204–208; *Molzof* v. *United States*, *supra*.

We thus agree with the Court of Appeals' analysis insofar as it focused, for purposes of § 104(a)(2), on the nature of the claim underlying respondents' damages award. See 929 F. 2d, at 1121; *Threlkeld* v. *Commissioner*, 87 T. C., at 1305. Respondents, for their part, agree that this is the appropriate inquiry, as does the dissent. See Brief for Respondents 9–12; *post*, at 250.[7] In order to come within the § 104(a)(2) income exclusion, respondents therefore must show that Title VII, the legal basis for their recovery of backpay, redresses a tort-like personal injury in accord with the foregoing principles. We turn next to this inquiry.

B

Title VII of the Civil Rights Act of 1964[8] makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

[7] The dissent nonetheless contends that we "misapprehen[d] the nature of the inquiry required by § 104(a)(2) and the IRS regulation" by "[f]ocusing on [the] remedies" available under Title VII. See *post*, at 249–250. As discussed above, however, the concept of a "tort" is inextricably bound up with remedies—specifically damages actions. Thus, we believe that consideration of the remedies available under Title VII is critical in determining the "nature of the statute" and the "type of claim" brought by respondents for purposes of § 104(a)(2). See *post*, at 250.

[8] As discussed below, the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071, amended Title VII in significant respects. Respondents do not contend that these amendments apply to this case. See Tr. of Oral Arg. 35–36. We therefore examine the law as it existed prior to November 21, 1991, the effective date of the 1991 Act. See Pub. L. 102–166, § 402(a), 105 Stat. 1099. Unless otherwise indicated, all references are to the "unamended" Title VII.

such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1). If administrative remedies are unsuccessful, an aggrieved employee may file suit in a district court, § 2000e–5(f)(1), although the Courts of Appeals have held that Title VII plaintiffs, unlike ordinary tort plaintiffs, are not entitled to a jury trial. See, *e. g.*, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (CA5 1969). See also *Curtis* v. *Loether*, 415 U. S. 189, 192–193 (1974) (describing availability of jury trials for common-law forms of action); *id.*, at 196–197, n. 13 (citing Title VII cases). If the court finds that the employer has engaged in an unlawful employment practice, it may enjoin the practice and "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g).

It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims. See Brief for Respondents 35–39; *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). The fact that employment discrimination causes harm to individuals does not automatically imply, however, that there exists a tort-like "personal injury" for purposes of federal income tax law.

Indeed, in contrast to the tort remedies for physical and nonphysical injuries discussed above, Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief. See § 2000e–5(g); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 182, n. 4 (1989) (noting that a plaintiff in a Title VII action is "limited to a recovery of backpay"); *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 374–375 (1979); *Sparrow* v. *Commissioner*, 292 U. S. App. D. C. 259, 262–263, 949 F. 2d 434, 437–

438 (1991) (collecting cases). An employee wrongfully discharged on the basis of sex thus may recover only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits;[9] similarly, an employee wrongfully denied a promotion on the basis of sex, or, as in this case, wrongfully discriminated against in salary on the basis of sex, may recover only the differential between the appropriate pay and actual pay for services performed, as well as lost benefits.

The Court previously has observed that Title VII focuses on "legal injuries of an economic character," see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975), consisting specifically of the unlawful deprivation of full wages earned or due for services performed, or the unlawful deprivation of the opportunity to earn wages through wrongful termination. The remedy, correspondingly, consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination. See *id.*, at 421 (citing 118 Cong. Rec. 7168 (1972)). Nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages (*e. g.*, a ruined credit rating). See *Walker* v. *Ford Motor Co.*, 684 F. 2d 1355, 1364–1365, n. 16 (CA11 1982).

No doubt discrimination could constitute a "personal injury" for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy. Cf. *Curtis* v. *Loether*, 415 U. S., at 195–196, n. 10 (noting that "under the logic of the common law development of a law of

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[9] Some courts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover "front pay" or future lost earnings. See, *e. g.*, *Shore* v. *Federal Express Corp.*, 777 F. 2d 1155, 1158–1160 (CA6 1985).

insult and indignity, racial discrimination might be treated as a dignitary tort" (internal quotation marks omitted)). Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well.[10] For example, Rev. Stat. § 1977, 42 U. S. C. § 1981, permits victims of race-based employment discrimination to obtain a jury trial at which "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages" may be awarded. *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 460 (1975). The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, "sounds basically in tort" and "contrasts sharply" with the relief available under Title VII. *Curtis* v. *Loether*, 415 U. S., at 195, 197; 42 U. S. C. § 3613(c).[11]

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[10] Title VII's remedial scheme was expressly modeled on the backpay provision of the National Labor Relations Act. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419–420, and n. 11 (1975); 29 U. S. C. § 160(c) (Board shall order persons to "cease and desist" from unfair labor practices and to take "affirmative action including reinstatement of employees with or without back pay"). This Court previously has held that backpay awarded under the Labor Act to an unlawfully discharged employee constitutes "wages" for purposes of the Social Security Act. See *Social Security Board* v. *Nierotko*, 327 U. S. 358 (1946).

[11] Respondents' attempts to prove that Title VII redresses a personal injury by relying on this Court's characterizations of other antidiscrimination statutes are thus unpersuasive in light of those statutes' differing remedial schemes. For example, respondents' reliance on *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987), is misplaced, as that case involved the interpretation of § 1981. See Brief for Respondents 35–37. Respondents' attempt to apply the Court's statement in *Curtis* v. *Loether*, 415 U. S., at 195, that Title VIII "sounds basically in tort" to the Title VII context similarly fails. See Brief for Respondents 32. Indeed, *Curtis* itself distinguishes Title VII from Title VIII on a host of different grounds. See 415 U. S., at 196–197. The dissent commits the same error as respondents in attempting to analogize suits arising under Title VII to

Notwithstanding a common-law tradition of broad tort damages and the existence of other federal antidiscrimination statutes offering similarly broad remedies, Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them—wages that, if paid in the ordinary course, would have been fully taxable. See L. Frolik, Federal Tax Aspects of Injury, Damage, and Loss 70 (1987). Thus, we cannot say that a statute such as Title VII,[12] whose sole remedial focus is the award of back wages, redresses a tort-like personal injury within the meaning of § 104(a)(2) and the applicable regulations.[13]

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those involving other federal antidiscrimination statutes for purposes of § 104(a)(2). See *post*, at 250–252.

[12] Respondents contend that Congress' recent expansion of Title VII's remedial scope supports their argument that Title VII claims are inherently tort-like in nature. See Brief for Respondents 34. Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a jury trial, at which they may recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. See Pub. L. 102–166, 105 Stat. 1073. Unlike respondents, however, we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended Act signals a marked change in its conception of the injury redressable by Title VII, and cannot be imported back into analysis of the statute as it existed at the time of this lawsuit. See, *e. g.*, H. R. Rep. No. 102–40, pt. 1, pp. 64–65 (1991) (Report of Committee on Education and Labor) ("Monetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity"); *id.*, pt. 2, p. 25 (Report of Committee on the Judiciary) ("The limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination").

[13] Our holding that damages received in settlement of a Title VII claim are not properly excludable under § 104(a)(2) finds support in longstanding rulings of the IRS. See, *e. g.*, Rev. Rule 72–341, 1972–2 Cum. Bull. 32 (payments by corporation to its employees in settlement of Title VII suit must be included in the employees' gross income, as the payments "were based on compensation that they otherwise would have received").

Accordingly, we hold that the backpay awards received by respondents in settlement of their Title VII claims are not excludable from gross income as "damages received . . . on account of personal injuries" under § 104(a)(2). The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

Section 104(a)(2) of the Internal Revenue Code excludes from gross income "the amount of any damages received . . . *on account of personal injuries or sickness.*" 26 U. S. C. § 104(a)(2) (emphasis added). The Court accepts at the outset of its analysis the Internal Revenue Service (IRS) regulation (dating from 1960) that identifies "personal injuries" under this exclusion with the violation of, generically, "tort or tort type rights," 25 Fed. Reg. 11490 (1960); 26 CFR § 1.104–1(c) (1991)[1]—thus extending the coverage of the provision to "'dignitary' or nonphysical tort[s] such as defamation," *ante*, at 235–236 (footnote omitted). Thereafter, the opinion simply considers the criterion for determining whether "tort or tort type rights" are at stake, the issue on which it disagrees with the dissent.

In my view there is no basis for accepting, without qualification, the IRS' "tort rights" formulation, since it is not within the range of reasonable interpretation of the statutory text. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). In isolation, I suppose, the term "personal injuries" can be read to encompass injury to any noncontractual interest "'for which the court will provide a remedy in the form of an action for

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[1] Though this regulation purports expressly to define only the term "damages received," 26 CFR § 1.104–1(c) (1991), and not the succeeding term we are called upon to interpret today ("personal injuries"), the IRS has long treated the regulation as descriptive of the ambit of § 104(a)(2) as a whole. See, *e. g.*, Rev. Rul. 85–98, 1985–2 Cum. Bull. 51; Brief for United States 22–23.

damages.'" *Ante*, at 234 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts 2 (1984)). That is assuredly not, however, the only permissible meaning of the term. Indeed, its more common connotation embraces only physical injuries to the person (as when the consequences of an auto accident are divided into "personal injuries" and "property damage"),[2] or perhaps, in addition, injuries to a person's mental health.

> "Under the American decisional law, the phrase 'personal injury' denotes primarily an injury to the body of a person. At least some of the courts, however, have not narrowly limited the term, and have concluded that a personal injury or an injury to the person, within the meaning of the law, does not necessarily involve physical contact with the person injured or mere bodily or physical injuries, but may embrace all actionable injuries to the individual himself." 1 S. Speiser, C. Krause, & A. Gans, American Law of Torts 6 (1983).

See also Black's Law Dictionary 786 (6th ed. 1990).

In deciding whether the words go beyond their more narrow and more normal meaning here, the critical factor, in my view, is the fact that "personal injuries" appears not in isolation but as part of the phrase "personal injuries or sickness." As the Court has said repeatedly, "[t]he maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). The term "sickness" connotes a "[d]iseased condition; illness; [or] ill health," Webster's New International Dictionary 2329–2330 (2d ed. 1950), and I think that its companion must similarly be read

[2] As it happens, this was the IRS' original understanding with regard to § 104(a)(2)'s predecessor, § 213(b)(6) of the Revenue Act of 1918, 40 Stat. 1066. See, *e. g.*, S. 1384, 2 Cum. Bull. 71 (1920).

to connote injuries to physical (or mental) health. It is almost as odd to believe that the first part of the phrase "personal injuries or sickness" encompasses defamation, as it would be to believe that the first part of the phrase "five feet, two inches" refers to pedal extremities.

The commonsense interpretation I suggest is supported as well by several other factors. First, the term "personal injuries or sickness" is used three other times in § 104(a), and in each instance its sense is necessarily limited to injuries to physical or mental health. See § 104(a)(1) (gross income does not include "amounts received under workmen's compensation acts as compensation *for personal injuries or sickness*" (emphasis added)); § 104(a)(3) (gross income does not include "amounts received through accident or health insurance *for personal injuries or sickness*" (emphasis added)); § 104(a)(4) (gross income does not include "amounts received as a pension, annuity, or similar allowance *for personal injuries or sickness* resulting from active service in the armed forces . . . or as a disability annuity payable under . . . the Foreign Service Act" (emphasis added)). When, sandwiched in among these provisions, one sees an exclusion for "the amount of any damages received . . . on account of personal injuries or sickness," one has little doubt what is intended, and it is not recovery for defamation (or other invasions of "personal" interests that do not, of necessity, harm the victim's physical or mental health). Second, the provision at issue here is a tax *exemption*, a category of text for which we have adopted a rule of narrow construction. See, *e. g.*, *United States* v. *Centennial Savings Bank FSB*, 499 U. S. 573, 583–584 (1991).[3]

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[3] Congress amended § 104(a), in 1989, to provide prospectively that § 104(a)(2) shall not shelter from taxation "punitive damages in connection with a case not involving physical injury or physical sickness." Pub. L. 101–239, § 7641(a), 103 Stat. 2379, 26 U. S. C. § 104(a) (1988 ed., Supp. I); see *id.*, § 7641(b). As thus amended it is clear (whereas previously it was not) that "personal injuries or sickness" includes not only physical, but

The question, then, is whether the settlement payments at issue in this case were "received . . . *on account of personal injuries*"—viz., "on account of" injuries to the recipients' physical or mental health—so as to qualify for exclusion under § 104(a)(2). I think not. Though it is quite possible for a victim of race- or sex-based employment discrimination to suffer psychological harm, her entitlement to backpay under Title VII does not depend on such a showing. *Whether or not* she has experienced the sort of disturbances to her mental health that the phrase "personal injuries" describes, a Title VII claimant is entitled to be "restor[ed] . . . to the wage and employment positio[n] [she] would have occupied absent the unlawful discrimination." *Ante*, at 239; see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 420–421 (1975) ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy . . ."). The only harm that Title VII dignifies with the status of redressable *legal* injury is the antecedent economic deprivation that produced the Title VII violation in the first place. See *id.*, at 418 ("Title VII deals with legal injuries of an economic character . . ."). I thus conclude that respondents did not receive their settlement payments (in respect of backpay) "on account of personal injuries" within the meaning of § 104(a)(2), and would reverse the judgment of the Court of Appeals.

It is true that the Secretary's current regulation, at least as it has been applied by the IRS, see n. 1, *supra*, contradicts the interpretation of the statute I have set forth above. But while agencies are bound by those regulations that are issued within the scope of their lawful discretion (at least until the regulations are modified or rescinded through appro-

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also psychological harm or disease; nevertheless, the amendment does not require the phrase unnaturally to be extended to injuries that affect neither mind nor body.

priate means, see, *e. g., Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 41–42 (1983)), they cannot be bound by regulations that are contrary to law. Otherwise, the Secretary of the Treasury would effectively be empowered to repeal taxes that the Congress enacts. Cf. *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 427–428 (1990). The existence of an ever-so-rare "taxpayer-friendly" Treasury regulation (however inconsistent with the statutory text) may be relevant to whether penalties for blameworthy failure to pay can be assessed, see *Cheek* v. *United States*, 498 U. S. 192 (1991), but it cannot control the determination whether the tax was due and owing according to Congress' command.

Finally (and relatedly), I must acknowledge that the basis for reversing the Court of Appeals on which I rely has not been argued by the United States, here or below. The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. See *United States* v. *Pryce*, 291 U. S. App. D. C. 84, 96, 938 F. 2d 1343, 1355 (1991) (Silberman, J., dissenting in part). Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment will reinforce error already prevalent in the system. See, *e. g., Arcadia* v. *Ohio Power Co.*, 498 U. S. 73 (1990). I think that is the case here.

For the foregoing reasons, I concur in the judgment.

JUSTICE SOUTER, concurring in the judgment.

Respondents may not exclude their recovery from taxable income unless their action was one "based upon tort or tort type rights." 26 CFR § 1.104–1(c) (1991). On the reasonable assumption that the regulation reflects the broad dichot-

omy between contract and tort posited by the dissent, *post*, at 249–252, there are good reasons to put a Title VII claim on the tort side of the line. There are definite parallels between, say, a defamation action, which vindicates the plaintiff's interest in good name, and a Title VII suit, which arguably vindicates an interest in dignity as a human being entitled to be judged on individual merit. Our cases have, indeed, recognized parallels (though for different purposes) between tort claims and claims under antidiscrimination statutes other than Title VII. See *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987) (similarity between claim under 42 U. S. C. § 1981 and personal-injury claim for purposes of determining applicable statute of limitations); *Wilson* v. *Garcia*, 471 U. S. 261, 277–278 (1985) (same for 42 U. S. C. § 1983).

The reasons do not go solely to that one side, however. While I do not join the majority in holding that the tort-like character of a claim should turn solely on whether the plaintiff can recover for "intangible elements of injury," *ante*, at 235, I agree that Title VII's limitation of recovery to lost wages ("back pay") counts against holding respondents' statutory action to be "tort type." Tort actions, it cannot be gainsaid, commonly (though not invariably*) permit recovery for intangible injury. *Ante*, at 234–237. Backpay, on the other hand, is quintessentially a contractual measure of damages.

A further similarity between Title VII and contract law, at least in the context of an existing employment relationship, is the great resemblance of rights guaranteed by Title VII to those commonly arising under the terms and condi-

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*In those States that have barred recovery in tort for "intangible elements of injury," see, *e. g.*, N. J. Stat. Ann. § 59:9–2(d) (West 1982) (action against public entity or employee); Wash. Rev. Code § 4.20.046(1) (1989) (action by estate of deceased), the modified action is still fairly described as one "based upon tort rights," and certainly is an "action based upon tort-type rights."

tions of an employment contract: Title VII's ban on discrimination is easily envisioned as a contractual term implied by law. See *Hishon* v. *King & Spalding*, 467 U. S. 69, 74–75, n. 6 (1984) ("Even if the employment contract did not afford a basis for an implied condition that the [decision to promote] would be fairly made on the merits, Title VII itself would impose such a requirement"); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 177 (1989) ("[T]he performance of established contract obligations and the conditions of continuing employment [are] matters . . . governed by state contract law and Title VII"). Indeed, it has been suggested that "the rights guaranteed by Title VII *are* implied terms of every employment contract . . . ." Shanor & Marcosson, Battleground for a Divided Court: Employment Discrimination in the Supreme Court, 1988–89, 6 Lab. Law. 145, 174, n. 118 (1990) (emphasis added).

In sum, good reasons tug each way. It is needless to decide which tug harder, however, for the outcome in this case follows from the default rule of statutory interpretation that exclusions from income must be narrowly construed. See *United States* v. *Centennial Savings Bank FSB*, 499 U. S. 573, 583–584 (1991); *Commissioner* v. *Jacobson*, 336 U. S. 28, 49 (1949). That is, an accession to wealth is not to be held excluded from income unless some provision of the Internal Revenue Code clearly so entails. There being here no clear application of 26 U. S. C. § 104(a)(2) as interpreted by the Treasury regulation, I concur in the judgment.

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, dissenting.

The Court holds that respondents, unlike most plaintiffs who secure compensation after suffering personal injury, must pay tax on their recoveries for alleged discrimination because suits under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 Stat. § 2000e *et seq.*, do not involve "tort type rights." This is so, the Court says, because

"Congress declined to recompense Title VII plaintiffs for anything beyond the wages properly due them." *Ante*, at 241. I cannot agree. In my view, the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce. The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability of recoveries for personal injury under 26 U. S. C. § 104(a)(2).

I

Section 104(a)(2) allows taxpayers to exclude from gross income "damages received . . . on account of personal injuries or sickness." The Court properly defers to an Internal Revenue Service (IRS) regulation that reasonably interprets the words "damages received" to mean "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 CFR § 1.104–1(c) (1991). See *ante*, at 234; *United States* v. *Correll*, 389 U. S. 299 (1967). Therefore, respondents may exclude from gross income any amount they received as a result of asserting a "tort type" right to recover for personal injury.

The Court appears to accept that discrimination in the workplace causes personal injury cognizable for purposes of § 104(a)(2), see *ante*, at 239, and there can be little doubt about this point. See *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987) ("[R]acial discrimination . . . is a fundamental injury to the individual rights of a person"); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 265 (1989) (O'CONNOR, J., concurring in judgment) ("[W]hatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual"). I disagree only with the Court's further holding that respondents' action did not assert tort-like rights because Congress limited the remedies available to Title VII plaintiffs. Focusing on remedies, it seems to me, misapprehends the

nature of the inquiry required by § 104(a)(2) and the IRS regulation. The question whether Title VII suits are based on the same sort of rights as a tort claim must be answered with reference to the nature of the statute and the type of claim brought under it.

Title VII makes employment discrimination actionable without regard to contractual arrangements between employer and employee. Functionally, the law operates in the traditional manner of torts: Courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses. "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of [discrimination].'" *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417–418 (1975) (quoting *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 379 (CA8 1973)).

Such a scheme fundamentally differs from contract liability, which "is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed." W. Prosser, Law of Torts 5 (4th ed. 1971). Title VII liability also is distinguishable from quasi-contractual liability, which "is created for the prevention of unjust enrichment of one man at the expense of another, and the restitution of benefits which in good conscience belong to the plaintiff." *Ibid.* It is irrelevant for purposes of Title VII that an employer profits from discriminatory practices; the purpose of liability is not to reassign economic benefits to their rightful owner, but to compensate employees for injury they suffer and to "eradicat[e] discrimination throughout the economy." *Albemarle Paper*, *supra*, at 421.

This Court has found statutory causes of action for discrimination analogous to tort suits on prior occasions, but

has not suggested that this comparison turns on the specific monetary relief available. In *Wilson* v. *Garcia*, 471 U. S. 261 (1985), we considered which state statute of limitations is most appropriately applied to a claim brought under 42 U. S. C. § 1983. The Court answered this question by looking not to the remedies afforded a § 1983 plaintiff, but to "the essence of the claim" and "the elements of the cause of action." *Id.*, at 268. Of greatest significance was the fact that Congress designed the Civil Rights Act of 1871 to provide a civil remedy for violations of constitutional rights in the postwar South. Because Congress was concerned with harms that "plainly sounded in tort," it only remained for the Court to select the best comparison from among "a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Id.*, at 277. In concluding that the closest state-law equivalent to a § 1983 suit is a tort claim for personal injury, the Court once more emphasized the rights made enforceable under federal law:

> "The unifying theme of the Civil Rights Act of 1871 is reflected in the language of the Fourteenth Amendment that unequivocally recognizes the equal status of every '*person*' subject to the jurisdiction of any of the several States. The Constitution's command is that all '*persons*' shall be accorded the full privileges of citizenship . . . . A violation of that command is an injury to the individual rights of the person." *Ibid.* (footnote omitted).

When asked in *Goodman* v. *Lukens Steel Co.*, *supra*, to determine the appropriate state analogue to a suit under 42 U. S. C. § 1981, the Court again considered the rights protected by federal law rather than the recovery that could be had by a plaintiff. As in *Wilson*, the tort-like nature of a § 1981 claim was clear. See 482 U. S., at 661. Accordingly, the Court quickly turned to rejecting the view that § 1981 suits are more similar to tort actions for interference with

contractual rights than to claims based on personal injury. The Court noted that while § 1981 deals partially with contracts, it is "part of a federal law barring racial discrimination, which . . . is a fundamental injury to the individual rights of a person." *Ibid.* Moreover, the economic consequences of § 1981 "flo[w] from guaranteeing the personal right to engage in economically significant activity free from racially discriminatory interference." *Id.*, at 661–662. The most analogous state statute of limitations in a § 1981 action is, therefore, the one governing personal injury suits. *Id.*, at 662.

Wilson and *Goodman* held federal civil rights suits analogous to personal injury tort actions not at all because of the damages available to civil rights plaintiffs, but because federal law protected individuals against tort-like personal injuries. Discrimination in the workplace being no less injurious than discrimination elsewhere, the rights asserted by persons who sue under Title VII are just as tort-like as the rights asserted by plaintiffs in actions brought under §§ 1981 and 1983.

II

The Court offers three additional reasons why respondents' recoveries should be taxed. First, it notes that amounts awarded under Title VII would have been received as taxable wages if there had been no discrimination, leaving the impression that failing to tax these recoveries would give victims of employment discrimination a windfall. See *ante*, at 241, and n. 13. Affording victims of employment discrimination this benefit, however, simply puts them on an equal footing with others who suffer personal injury. For example, "[i]f a taxpayer receives a damage award for a physical injury, which almost by definition is personal, the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury." *Threlkeld* v. *Commissioner*, 87 T. C. 1294, 1300 (1986), aff'd, 848 F. 2d 81 (CA6 1988). I see no

inequity in treating Title VII litigants like other plaintiffs who suffer personal injury.

Second, the Court intimates that the unavailability of jury trials to Title VII plaintiffs bears on determining the nature of the claim they bring. See *ante*, at 240, 241, n. 12. Here, the Court apparently assumes the answer to a question we have expressly declined to address on recent occasions. See *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 549, n. 1 (1990) ("This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial. . . . [W]e express no opinion on that issue here"); *Teamsters* v. *Terry*, 494 U. S. 558, 572 (1990). More importantly, the Court does not explain what relevance the availability of jury trials holds for the question of excludability under § 104(a)(2). The suggestion is that Title VII recoveries are not excludable under this section because employment discrimination suits are equitable rather than legal in nature. Cf. *Sparrow* v. *Commissioner*, 292 U. S. App. D. C. 259, 949 F. 2d 434 (1991). That argument, however, ignores the very IRS regulation the Court purports to apply. Instead of construing the statutory term "damages" as a reference to the remedy traditionally available in actions at law, the IRS defines "damages" to mean "an amount" recovered through prosecution or settlement of a "legal *suit or action* based upon *tort or tort type* rights." 26 CFR § 1.104–1(c) (1991) (emphasis added). This inclusive definition renders the historical incidents of "actions at law" and "suits in equity" irrelevant to the proper interpretation of § 104(a)(2).

Finally, the Court asserts that Congress fundamentally changed the nature of a Title VII suit when it enacted the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071. By authorizing compensatory and punitive damages in addition to backpay and injunctive relief, the Court suggests, Congress extended the statute's scope beyond purely economic losses to personal injury. See *ante*, at 241, n. 12. This theory is odd on its face, for even before the 1991

amendments Title VII reached much more than discrimination in the economic aspects of employment. The protection afforded under Title VII has always been expansive, extending not just to economic inequality, but also to "'working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers'" and "'demeaning and disconcerting'" conditions of employment. *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U. S. 57, 66, 67 (1986) (quoting *Rogers* v. *EEOC*, 454 F. 2d 234, 238 (CA5 1971), cert. denied, 406 U. S. 957 (1972); *Henson* v. *Dundee*, 682 F. 2d 897, 902 (CA11 1982)).

Given the historic reach of Title VII, Congress' decision to authorize comparably broad remedies most naturally suggests that legislators thought existing penalties insufficient to effectuate the law's settled purposes. There is no need to guess whether Congress had a new conception of injury in mind, however. The Legislature set out the reason for new remedies in the statute itself, explaining that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." Pub. L. 102–166, §2, 105 Stat. 1071. This authoritative evidence that Congress added new penalties principally to effectuate an established goal of Title VII, not contrary speculation, should guide our decision.

By resting on the remedies available under Title VII and distinguishing the recently amended version of that law, the Court does make today's decision a narrow one. Nevertheless, I remain of the view that Title VII offers a tort-like cause of action to those who suffer the injury of employment discrimination. See *Price Waterhouse* v. *Hopkins*, 490 U. S., at 264–265 (O'CONNOR, J., concurring in judgment). For this reason, I respectfully dissent.

Syllabus

EVANS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90–6105. Argued December 9, 1991—Decided May 26, 1992

As part of an investigation of allegations of public corruption in Georgia, a Federal Bureau of Investigation agent posing as a real estate developer initiated a number of conversations with petitioner Evans, an elected member of the DeKalb County Board of Commissioners. The agent sought Evans' assistance in an effort to rezone a tract of land and gave him, *inter alia*, $7,000 in cash, which Evans failed to report on his state campaign-financing disclosure form or his federal income tax return. Evans was convicted in the District Court of, among other things, extortion under the Hobbs Act, which is "the obtaining of property from another, . . . induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U. S. C. § 1951(b)(2). In affirming the conviction, the Court of Appeals acknowledged that the trial court's jury instruction did not require a finding that Evans had demanded or requested the money, or that he had conditioned the performance of any official act upon its receipt. However, it held that "passive acceptance of the benefit" was sufficient for a Hobbs Act violation if the public official knew that he was being offered the payment in exchange for a specific requested exercise of his official power.

Held: An affirmative act of inducement by a public official, such as a demand, is not an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act. Pp. 259–271.

(a) Congress is presumed to have adopted the common-law definition of extortion—which does not require that a public official make a demand or request—unless it has instructed otherwise. See *Morissette* v. *United States*, 342 U. S. 246, 263. While the Act expanded the common-law definition to encompass conduct by a private individual as well as a public official, the portion of the Act referring to official misconduct continues to mirror the common-law definition. There is nothing in the sparse legislative history or the statutory text that could fairly be described as a "contrary direction," *ibid.*, from Congress to narrow the offense's scope. The inclusion of the word "induced" in the definition does not require that the wrongful use of official power begin with a public official. That word is part of the definition of extortion by a private individual but not by a public official, and even if it did apply to

a public official, it does not necessarily indicate that a transaction must be initiated by the bribe's recipient. Pp. 259–266.

(b) Evans' criticisms of the jury instruction—that it did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution, and that it did not require the jury to find duress—are rejected. The instruction satisfies the *quid pro quo* requirement of *McCormick* v. *United States*, 500 U. S. 257, because the offense is completed when the public official receives payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense. Nor is an affirmative step on the official's part an element of the offense on which an instruction need be given. Pp. 267–268.

(c) The conclusion herein is buttressed by the facts that many courts have interpreted the statute in the same way, and that Congress, although aware of this prevailing view, has remained silent. Pp. 268–269.

910 F. 2d 790, affirmed.

STEVENS, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, and SOUTER, JJ., joined, in Parts I and II of which O'CONNOR, J., joined, and in Part III of which KENNEDY, J., joined. O'CONNOR, J., *post*, p. 272, and KENNEDY, J., *post*, p. 272, filed opinions concurring in part and concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 278.

C. Michael Abbott, by appointment of the Court, 501 U. S. 1229, argued the cause and filed briefs for petitioner.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Christopher J. Wright*, and *Richard A. Friedman*.

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari, 500 U. S. 951 (1991), to resolve a conflict in the Circuits over the question whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act, 18 U. S. C. § 1951. We agree with the Court of Appeals for the Eleventh Circuit that it is not, and therefore affirm the judgment of the court below.

I

Petitioner was an elected member of the Board of Commissioners of DeKalb County, Georgia. During the period between March 1985 and October 1986, as part of an effort by the Federal Bureau of Investigation (FBI) to investigate allegations of public corruption in the Atlanta area, particularly in the area of rezonings of property, an FBI agent posing as a real estate developer talked on the telephone and met with petitioner on a number of occasions. Virtually all, if not all, of those conversations were initiated by the agent and most were recorded on tape or video. In those conversations, the agent sought petitioner's assistance in an effort to rezone a 25-acre tract of land for high-density residential use. On July 25, 1986, the agent handed petitioner cash totaling $7,000 and a check, payable to petitioner's campaign, for $1,000. Petitioner reported the check, but not the cash, on his state campaign-financing disclosure form; he also did not report the $7,000 on his 1986 federal income tax return. Viewing the evidence in the light most favorable to the Government, as we must in light of the verdict, see *Glasser* v. *United States*, 315 U. S. 60, 80 (1942), we assume that the jury found that petitioner accepted the cash knowing that it was intended to ensure that he would vote in favor of the rezoning application and that he would try to persuade his fellow commissioners to do likewise. Thus, although petitioner did not initiate the transaction, his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver.

In a two-count indictment, petitioner was charged with extortion in violation of 18 U. S. C. § 1951 and with failure to report income in violation of 26 U. S. C. § 7206(1). He was convicted by a jury on both counts. With respect to the extortion count, the trial judge gave the following instruction:

> "The defendant contends that the $8,000 he received from agent Cormany was a campaign contribution. The

> solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.
>
> "However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." App. 16–17.

In affirming petitioner's conviction, the Court of Appeals noted that the instruction did not require the jury to find that petitioner had demanded or requested the money, or that he had conditioned the performance of any official act upon its receipt. 910 F. 2d 790, 796 (CA11 1990). The Court of Appeals held, however, that "passive acceptance of a benefit by a public official *is* sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit." *Ibid.* (emphasis in original).[1]

This statement of the law by the Court of Appeals for the Eleventh Circuit is consistent with holdings in eight other

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[1] The Court of Appeals explained its conclusion as follows:

"[T]he requirement of inducement is *automatically* satisfied by the power connected with the public office. Therefore, once the defendant has shown that a public official has accepted money in return for a requested exercise of official power, no additional inducement need be shown. 'The coercive nature of the official office provides all the inducement necessary.'" 910 F. 2d, at 796–797 (footnote omitted).

Circuits.[2] Two Circuits, however, have held that an affirmative act of inducement by the public official is required to support a conviction of extortion under color of official right. *United States* v. *O'Grady*, 742 F. 2d 682, 687 (CA2 1984) (en banc) ("Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits"); *United States* v. *Aguon*, 851 F. 2d 1158, 1166 (CA9 1988) (en banc) ("We find ourselves in accord with the Second Circuit's conclusion that inducement is an element required for conviction under the Hobbs Act"). Because the majority view is consistent with the common-law definition of extortion, which we believe Congress intended to adopt, we endorse that position.

II

It is a familiar "maxim that a statutory term is generally presumed to have its common-law meaning." *Taylor* v. *United States*, 495 U. S. 575, 592 (1990). As we have explained: "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a depar-

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[2] See *United States* v. *Garner*, 837 F. 2d 1404, 1423 (CA7 1987), cert. denied, 486 U. S. 1035 (1988); *United States* v. *Spitler*, 800 F. 2d 1267, 1274–1275 (CA4 1986); *United States* v. *Jannotti*, 673 F. 2d 578, 594–596 (CA3) (en banc), cert. denied, 457 U. S. 1106 (1982); *United States* v. *French*, 628 F. 2d 1069, 1074 (CA8), cert. denied, 449 U. S. 956 (1980); *United States* v. *Williams*, 621 F. 2d 123, 123–124 (CA5 1980), cert. denied, 450 U. S. 919 (1981); *United States* v. *Butler*, 618 F. 2d 411, 417–420 (CA6), cert. denied, 447 U. S. 927 (1980); *United States* v. *Hall*, 536 F. 2d 313, 320–321 (CA10), cert. denied, 429 U. S. 919 (1976); *United States* v. *Hathaway*, 534 F. 2d 386, 393–394 (CA1), cert. denied, 429 U. S. 819 (1976).

ture from them." *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).[3]

At common law, extortion was an offense committed by a public official who took "by colour of his office"[4] money that was not due to him for the performance of his official duties.[5] A demand, or request, by the public official was not an element of the offense.[6] Extortion by the public official was the rough equivalent of what we would now describe as "taking a bribe." It is clear that petitioner committed that offense.[7] The question is whether the federal statute, insofar

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[3] Or, as Justice Frankfurter advised, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947).

[4] Blackstone described extortion as "an abuse of public justice, which consists in an officer's unlawfully taking, *by colour of his office*, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries *141 (emphasis added). He used the phrase "by colour of his office," rather than the phrase "under color of official right," which appears in the Hobbs Act. Petitioner does not argue that there is any difference in the phrases. Hawkins' definition of extortion is probably the source for the official right language used in the Hobbs Act. See Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 864 (1988) (hereinafter Lindgren). Hawkins defined extortion as follows:

"[I]t is said, That extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due." 1 W. Hawkins, Pleas of the Crown 316 (6th ed. 1787).

[5] See Lindgren 882–889. The dissent says that we assume that "common-law extortion encompassed *any* taking by a public official of something of value that he was not 'due.'" *Post*, at 279. That statement, of course, is incorrect because, as stated in the text above, the payment must be "for the performance of his official duties."

[6] Lindgren 884–886.

[7] Petitioner argued to the jury, at least with respect to the extortion count, that he had been entrapped, see App. 20; however, in light of the jury's verdict on that issue, we must assume that he was predisposed to commit the crime.

as it applies to official extortion, has narrowed the common-law definition.

Congress has unquestionably *expanded* the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats. It did so by implication in the Travel Act, 18 U. S. C. § 1952, see *United States* v. *Nardello*, 393 U. S. 286, 289–296 (1969), and expressly in the Hobbs Act. The portion of the Hobbs Act that is relevant to our decision today provides:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> . . . . .
>
> "(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U. S. C. § 1951.

The present form of the statute is a codification of a 1946 enactment, the Hobbs Act,[8] which amended the federal Anti-Racketeering Act.[9] In crafting the 1934 Act, Congress was

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[8] The 1946 enactment provides:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.'" Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420.

[9] Section 2(b) of the 1934 Act read as follows:

"SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

. . . . .

careful not to interfere with legitimate activities between employers and employees. See H. R. Rep. No. 1833, 73d Cong., 2d Sess., 2 (1934). The 1946 amendment was intended to encompass the conduct held to be beyond the reach of the 1934 Act by our decision in *United States* v. *Teamsters*, 315 U. S. 521 (1942).[10] The amendment did not make any significant change in the section referring to obtaining property "under color of official right" that had been prohibited by the 1934 Act. Rather, Congress intended to broaden the scope of the Anti-Racketeering Act and was concerned pri-

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"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right." Act of June 18, 1934, ch. 569, § 2, 48 Stat. 979–980.

One of the models for the statute was the New York statute:

"Extortion is the obtaining of property from another, or the obtaining the *[sic]* property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right." Penal Law of 1909, § 850, as amended, 1917 N. Y. Laws, ch. 518, codified in N. Y. Penal Law § 850 (McKinney Supp. 1965).

The other model was the Field Code, a 19th-century model code:

"Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Commissioners of the Code, Proposed Penal Code of the State of New York § 613 (1865) (Field Code).

Lindgren points out that according to the Field Code, coercive extortion and extortion by official right extortion are separate offenses, and the New York courts recognized this difference when, in 1891, they said the Field Code treats "extortion by force and fear as one thing, and extortion by official action as another." *People* v. *Barondess*, 61 Hun. 571, 576, 16 N. Y. S. 436, 438 (App. Div. 1891). The judgment in this case was later reversed without opinion. See 133 N. Y. 649, 31 N. E. 240 (1892). Lindgren identifies early English statutes and cases to support his contention that official extortion did not require a coercive taking, nor did it under the early American statutes, including the later New York statute. See Lindgren 869, 908.

[10] In *United States* v. *Teamsters*, the Court construed the exemption for "'the payment of wages by a bona-fide employer to a bona-fide employee'" that was contained in the 1934 Act but is no longer a part of the statute. 315 U. S., at 527.

marily with distinguishing between "legitimate" labor activity and labor "racketeering," so as to prohibit the latter while permitting the former. See 91 Cong. Rec. 11899–11922 (1945).

Many of those who supported the amendment argued that its purpose was to end the robbery and extortion that some union members had engaged in, to the detriment of all labor and the American citizenry. They urged that the amendment was not, as their opponents charged, an antilabor measure, but rather, it was a necessary measure in the wake of this Court's decision in *United States* v. *Teamsters*.[11] In their view, the Supreme Court had mistakenly exempted labor from laws prohibiting robbery and extortion, whereas Congress had intended to extend such laws to all American citizens. See, *e. g.*, 91 Cong. Rec. 11910 (1945) (remarks of Rep. Springer) ("To my mind this is a bill that protects the honest laboring people in our country. There is nothing contained in this bill that relates to labor. This measure, if passed, will relate to every American citizen"); *id.*, at 11912 (remarks of Rep. Jennings) ("The bill is one to protect the right of citizens of this country to market their products without any interference from lawless bandits").

Although the present statutory text is much broader[12] than the common-law definition of extortion because it encompasses conduct by a private individual as well as conduct

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[11] In fact, the House Report sets out the text of *United States* v. *Teamsters* in full, to make clear that the amendment to the Anti-Racketeering Act was in direct response to the Supreme Court decision. See H. R. Rep. No. 238, 79th Cong., 1st Sess., 1–10 (1945).

[12] This Court recognized the broad scope of the Hobbs Act in *Stirone* v. *United States*, 361 U. S. 212, 215 (1960):

"That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'"

by a public official,[13] the portion of the statute that refers to official misconduct continues to mirror the common-law definition. There is nothing in either the statutory text or the legislative history that could fairly be described as a "contrary direction," *Morissette* v. *United States*, 342 U. S., at 263, from Congress to narrow the scope of the offense.

The legislative history is sparse and unilluminating with respect to the offense of extortion. There is a reference to the fact that the terms "robbery and extortion" had been construed many times by the courts and to the fact that the definitions of those terms were "based on the New York law." 89 Cong. Rec. 3227 (1943) (statement of Rep. Hobbs); see 91 Cong. Rec. 11906 (1945) (statement of Rep. Robsion). In view of the fact that the New York statute applied to a public officer "who asks, or receives, or agrees to receive" unauthorized compensation, N. Y. Penal Code § 557 (1881), the reference to New York law is consistent with an intent to apply the common-law definition. The language of the New York statute quoted above makes clear that extortion could be committed by one who merely *received* an unauthor-

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[13] Several States had already defined the offense of extortion broadly enough to include the conduct of the private individual as well as the conduct of the public official. See, *e. g.*, *United States* v. *Nardello*, 393 U. S. 286, 289 (1969) ("In many States . . . the crime of extortion has been statutorily expanded to include acts by private individuals under which property is obtained by means of force, fear, or threats"); *Bush* v. *State*, 19 Ariz. 195, 198, 168 P. 508, 509–510 (1917) (recognizing that the state Penal Code "has enlarged the scope of this offense so as not to confine the commission of it to those persons who act under color of official right"); *People* v. *Peck*, 43 Cal. App. 638, 643, 185 P. 881, 882–883 (1919) (In some States "the statutory definitions have extended the scope of the offense beyond that of the common law so as to include the unlawful taking of money or thing of value of another by any person, whether a public officer or a private individual, and this is so in California . . .").

At least one commentator has argued that, at common law, extortion under color of official right could also be committed by a private individual. See Lindgren 875.

ized payment.[14] This was the statute that was in force in New York when the Hobbs Act was enacted.

The two courts that have disagreed with the decision to apply the common-law definition have interpreted the word "induced" as requiring a wrongful use of official power that "begins with the public official, not with the gratuitous actions of another." *United States* v. *O'Grady*, 742 F. 2d, at 691; see *United States* v. *Aguon*, 851 F. 2d, at 1166 ("'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation'"). If we had no common-law history to guide our interpretation of the statutory text, that reading would be plausible. For two reasons, however, we are convinced that it is incorrect.

First, we think the word "induced" is a part of the definition of the offense by the private individual, but not the offense by the public official. In the case of the private individual, the victim's consent must be "induced by wrongful use of actual or threatened force, violence or fear." In the case of the public official, however, there is no such requirement. The statute merely requires of the public official that he obtain "property from another, with his consent, . . . under color of official right." The use of the word "or" before "under color of official right" supports this reading.[15]

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[14] Many of the treatise writers explained that, at common law, extortion was defined as the corrupt taking or receipt of an unlawful fee by a public officer under color of office. They did not allude to any requirements of "inducement" or "demand" by a public officer. See, *e. g.*, W. LaFave & A. Scott, Handbook on Criminal Law § 95, p. 704 (1972); R. Perkins & R. Boyce, Criminal Law 448 (1982); 4 C. Torcia, Wharton's Criminal Law § 695, p. 481, § 698, p. 484 (14th ed. 1981).

[15] This meaning would, of course, have been completely clear if Congress had inserted the word "either" before its description of the private offense because the word "or" already precedes the description of the public offense. The definition would then read: "The term 'extortion' means the obtaining of property from another, with his consent, *either* induced by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right."

Second, even if the statute were parsed so that the word "induced" applied to the public officeholder, we do not believe the word "induced" necessarily indicates that the transaction must be *initiated* by the recipient of the bribe. Many of the cases applying the majority rule have concluded that the wrongful acceptance of a bribe establishes all the inducement that the statute requires.[16] They conclude that the coercive element is provided by the public office itself. And even the two courts that have adopted an inducement requirement for extortion under color of official right do not require proof that the inducement took the form of a threat or demand. See *United States* v. *O'Grady*, 742 F. 2d, at 687; *United States* v. *Aguon*, 851 F. 2d, at 1166.[17]

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[16] See, *e. g.*, *United States* v. *Holzer*, 816 F. 2d 304, 311 (CA7), vacated on other grounds, 484 U. S. 807 (1987), aff'd in part on remand, 840 F. 2d 1343 (CA7), cert. denied, 486 U. S. 1035 (1988); *United States* v. *Paschall*, 772 F. 2d 68, 72–74 (CA4 1985); *United States* v. *Williams*, 621 F. 2d, at 124; *United States* v. *Butler*, 618 F. 2d, at 418.

[17] Moreover, we note that while the statute does not require that affirmative inducement be proven as a distinct element of the Hobbs Act, there is evidence in the record establishing that petitioner received the money with the understanding that he would use his office to aid the bribegiver. Petitioner and the agent had several exchanges in which they tried to clarify their understanding with each other. For example, petitioner said to the agent: "I understand both of us are groping . . . for what we need to say to each other. . . . I'm gonna work. Let m[e] tell you I'm gonna work, if you didn't give me but three [thousand dollars], on this, I've promised to help you. I'm gonna work to do that. You understand what I mean. . . . If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you. I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do." App. 36–37.

Petitioner instructed the agent on the form of the payment ("What you do, is make me out one, ahh, for a thousand. . . . And, and that means we gonna record it and report it and then the rest would be cash"), and agreed with the agent that the payment was being made, not because it was an election year, but because there was a budget to support petitioner's ac-

Petitioner argues that the jury charge with respect to extortion, see *supra*, at 257–258, allowed the jury to convict him on the basis of the "passive acceptance of a contribution." Brief for Petitioner 24.[18] He contends that the instruction did not require the jury to find "an element of du-

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tions, and that there would be a budget either way ("Either way, yep. Oh, I understand that. I understand"). *Id.*, at 38.

[18] Petitioner also makes the point that "[t]he evidence at trial against [petitioner] is more conducive to a charge of bribery than one of extortion." Brief for Petitioner 40. Although the evidence in this case may have supported a charge of bribery, it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery. Courts addressing extortion by force or fear have occasionally said that extortion and bribery are mutually exclusive, see, *e. g.*, *People* v. *Feld*, 262 App. Div. 909, 28 N. Y. S. 2d 796, 797 (1941); while that may be correct when the victim was intimidated into making a payment (extortion by force or fear), and did not offer it voluntarily (bribery), that does not lead to the conclusion that extortion under color of official right and bribery are mutually exclusive under either common law or the Hobbs Act. See, *e. g.*, Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3 Seton Hall L. Rev. 1, 14 (1971) ("If the [Hobbs] Act is read in full, the distinction between bribery and extortion becomes unnecessary where public officials are involved").

Another commentator has argued that bribery and extortion were overlapping crimes, see Lindgren 905, 908, and has located an early New York case in which the defendant was convicted of both bribery and extortion under color of official right, see *People* v. *Hansen*, 241 N. Y. 532, 150 N. E. 542 (1925), aff'g, 211 App. Div. 861, 207 N. Y. S. 894 (1924). He also makes the point that the cases usually cited for the proposition that extortion and bribery are mutually exclusive crimes are cases involving extortion by fear and bribery, see, *e. g.*, *People* v. *Feld*, *supra*; *People* v. *Dioguardi*, 8 N. Y. 2d 260, 263, 271–273, 168 N. E. 2d 683, 685, 690–692 (1960), and we note that the latter case was decided after the Hobbs Act, so it could not have been a case on which Congress relied. We agree with the Seventh Circuit in *United States* v. *Braasch*, 505 F. 2d 139, 151, n. 7 (1974), cert. denied, 421 U. S. 910 (1975), that "'the modern trend of the federal courts is to hold that bribery and extortion as used in the Hobbs Ac[t] are not mutually exclusive. *United States* v. *Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), cert. den., 411 U. S. 982.'"

ress such as a demand," *id.*, at 22, and it did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution.

We reject petitioner's criticism of the instruction, and conclude that it satisfies the *quid pro quo* requirement of *McCormick* v. *United States*, 500 U. S. 257 (1991), because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense. We also reject petitioner's contention that an affirmative step is an element of the offense of extortion "under color of official right" and need be included in the instruction.[19] As we explained above, our construction of the statute is informed by the common-law tradition from which the term of art was drawn and understood. We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.[20]

Our conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way.[21] Moreover,

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[19] We do not reach petitioner's second claim pertaining to the tax fraud count because, as petitioner conceded at oral argument, we would only have to reach that claim in the event that petitioner succeeded on his Hobbs Act claim. See Tr. of Oral Arg. 3–4, 27.

[20] The dissent states that we have "simply made up," *post*, at 286, the requirement that the payment must be given in return for official acts. On the contrary, that requirement is derived from the statutory language "under color of official right," which has a well-recognized common-law heritage that distinguished between payments for private services and payments for public services. See, *e. g.*, *Collier* v. *State*, 55 Ala. 125 (1877), which the dissent describes as a "typical case." *Post*, at 281.

[21] See, *e. g.*, *United States* v. *Swift*, 732 F. 2d 878, 880 (CA11 1984), cert. denied, 469 U. S. 1158 (1985); *United States* v. *Jannotti*, 673 F. 2d, at 594–596; *United States* v. *French*, 628 F. 2d, at 1074; *United States* v. *Williams*, 621 F. 2d, at 123–124; *United States* v. *Butler*, 618 F. 2d, at 417–418; *United States* v. *Hall*, 536 F. 2d, at 320–321; *United States* v. *Hathaway*, 534 F.

given the number of appellate court decisions, together with the fact that many of them have involved prosecutions of important officials well known in the political community,[22] it is obvious that Congress is aware of the prevailing view that common-law extortion is proscribed by the Hobbs Act. The silence of the body that is empowered to give us a "contrary direction" if it does not want the common-law rule to survive is consistent with an application of the normal presumption identified in *Taylor* and *Morissette*.

III

An argument not raised by petitioner is now advanced by the dissent. It contends that common-law extortion was *limited* to wrongful takings under a false pretense of official right. *Post*, at 279–280; see *post*, at 281 (offense of extortion "was understood . . . [as] a wrongful taking *under a false pretense of official right*") (emphasis in original); *post*, at 282. It is perfectly clear, however, that although extortion accomplished by fraud was a well-recognized type of extortion, there were other types as well. As the court explained in *Commonwealth* v. *Wilson*, 30 Pa. Super. 26 (1906), an extortion case involving a payment by a would-be brothel owner to a police captain to ensure the opening of her house:

> "The form of extortion most commonly dealt with in the decisions is the corrupt taking by a person in office of a

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2d, at 393–394; *United States* v. *Price*, 507 F. 2d 1349 (CA4 1974); *United States* v. *Braasch*, 505 F. 2d, at 151.

[22] For example, in *United States* v. *Hall*, *supra*, the Governor of Oklahoma was convicted of extorting money "under color of official right," in violation of the Hobbs Act; in *United States* v. *Kenny*, 462 F. 2d 1205, 1211 (CA3 1972), each of the eight defendants, who was part of a scheme to interfere with interstate commerce in violation of the Hobbs Act, "was, or had been, a highly placed public official or political leader in Jersey City or Hudson County or both"; and in *United States* v. *Jannotti*, 673 F. 2d, at 578, the Government operation, which came to be known as ABSCAM, led to the trial and conviction of various local and federal public officials, which, in other phases of the operation, included several Congressmen.

> fee for services which should be rendered gratuitously; or when compensation is permissible, of a larger fee than the law justifies, or a fee not yet due; but this is not a complete definition of the offense, by which I mean that it does not include every form of common-law extortion." *Id.*, at 30.

See also *Commonwealth* v. *Brown*, 23 Pa. Super. 470, 488–489 (1903) (defendants charged with and convicted of conspiracy to extort because they accepted pay for obtaining and procuring the election of certain persons to the position of schoolteachers); *State* v. *Sweeney*, 180 Minn. 450, 456, 231 N. W. 225, 228 (1930) (alderman's acceptance of money for the erection of a barn, the running of a gambling house, and the opening of a filling station would constitute extortion) (dicta); *State* v. *Barts*, 132 N. J. L. 74, 76, 83, 38 A. 2d 838, 841, 844 (Sup. Ct. 1944) (police officer, who received $1,000 for not arresting someone who had stolen money, was properly convicted of extortion because "generically extortion is an abuse of public justice and a misuse by oppression of the power with which the law clothes a public officer"); *White* v. *State*, 56 Ga. 385, 389 (1876) (If a ministerial officer used his position "for the purpose of awing or seducing" a person to pay him a bribe that would be extortion).

The dissent's theory notwithstanding, not one of the cases it cites, see *post*, at 281–282, and n. 3, holds that the public official is innocent unless he has deceived the payor by representing that the payment was proper. Indeed, none makes any reference to the state of mind of the payor, and none states that a "false pretense" is an element of the offense. Instead, those cases merely support the proposition that the services for which the fee is paid must be official and that the official must not be entitled to the fee that he collected—both elements of the offense that are clearly satisfied in this case. The complete absence of support for the dissent's thesis presumably explains why it was not advanced by petitioner in the District Court or the Court of Appeals, is not

recognized by any Court of Appeals, and is not advanced in any scholarly commentary.[23]

The judgment is affirmed.

It is so ordered.

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[23] Moreover, the dissent attempts to have it both ways in its use of common-law history. It wants to draw an artificial line and say that we should only look at American common law and not at the more ancient English common law (even though the latter provided the roots for the former), see *post*, at 280–281, and at the same time, it criticizes the Court for relying on a "'modern' view of extortion," *post*, at 285–286, n. 4; it also uses a 1961 case, which was decided 15 years *after* the enactment of the Hobbs Act, to explain the American view of the common-law crime of extortion at the time of the Act, see *ibid.*, even though it claims that we are only supposed to look at "the American understanding of the crime at the time the Hobbs Act was passed in 1946." *Post*, at 281. Moreover, the 1961 case that it cites, *State* v. *Begyn*, 34 N. J. 35, 46, 167 A. 2d 161, 166, in which a sanitary inspector was charged with extortion for accepting payments by a scavenger who held a garbage removal contract and who made payments in order to ensure the continuation of the contract, merely supports the proposition that extortion was not limited to the overpayment of fees. The common-law crime of extortion was broader than the dissent now attempts to paint it, and in any of the historical periods to which the dissent wants to point there are cases that are contrary to the dissent's narrow view. For "modern" cases, see *Begyn*, *supra*, and *State* v. *Barts*, 132 N. J. L. 74, 38 A. 2d 838 (1944); for early American common-law cases, see *supra*, at 269–270; and for English common-law cases, see, *e. g.*, 36 Lincoln Record Society, A Lincolnshire Assize Roll for 1298, p. 74, no. 322 (W. Thomson ed. 1944) (Adam of Lung (1298)) (was convicted of extortion for accepting payment to spare a man from having to contribute to an official collection of a quantity of malt); 10 Calendar of Patent Rolls, Edward III, A. D. 1354–1358, p. 449 (1909) (Hugh de Elmeshale (1356)) (coroner would not perform his "office without great ransoms and that he used to extort money from the people by false and feigned indictments"); Calendar of Patent Rolls, Edward II, A. D. 1313–1317, pp. 681–682 (1898) (Robert de Somery (1317)) (Robert de Somery, commissioner of array for Worcester received money from men "in order that by his connivance they might escape service and remain at home"); 1 Middlesex County Records (Old Series) 69 (J. Jeaffreson ed. 1886) (Smythe (1570)) (one of Queen Elizabeth's providers of wagons for ale and beer "by color of his office took extortionately" payments from the wagon owners to exonerate them from their obligations to the Queen).

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion, because in my view they correctly answer the question on which the Court granted certiorari—whether or not an act of inducement is an element of the offense of extortion under color of official right. See Pet. for Cert. i. The issue raised by the dissent and discussed in Part III of the Court's opinion is not fairly included in this question, see this Court's Rule 14.1(a), and sound prudential reasons suggest that the Court should not address it. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 535–538 (1992). Neither party in this case has briefed or argued the question. A proper resolution of the issue requires a detailed examination of common law extortion cases, which in turn requires intensive historical research. As there appear to be substantial arguments on either side, we would be far more assured of arriving at the correct result were we to await a case in which the issue had been addressed by the parties. It is unfair to the United States to decide a case on a ground not raised by the petitioner and which the United States has had no opportunity to address. For these reasons, I join neither the dissent nor Part III of the Court's opinion, and I express no view as to which is correct.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

The Court gives a summary of its decision in these words: "We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Ante*, at 268. In my view the dissent is correct to conclude that this language requires a *quid pro quo* as an element of the Government's case in a prosecution under 18 U. S. C. § 1951, see *post*, at 285–287, and the Court's opinion can be interpreted in a way that is consistent with this rule. Although the Court appears to accept the re-

quirement of a *quid pro quo* as an alternative rationale, in my view this element of the offense is essential to a determination of those acts which are criminal and those which are not in a case in which the official does not pretend that he is entitled by law to the property in question. Here the prosecution did establish a *quid pro quo* that embodied the necessary elements of a statutory violation. I join Part III of the Court's opinion and concur in the judgment affirming the conviction. I write this separate opinion to explain my analysis and understanding of the statute.

With regard to the question whether the word "induced" in the statutory definition of extortion applies to the phrase "under color of official right," 18 U. S. C. § 1951(b)(2), I find myself in substantial agreement with the dissent. Scrutiny of the placement of commas will not, in the final analysis, yield a convincing answer, and we are left with two quite plausible interpretations. Under these circumstances, I agree with the dissent that the rule of lenity requires that we avoid the harsher one. See *post*, at 289. We must take as our starting point the assumption that the portion of the statute at issue here defines extortion as "the obtaining of property from another, with his consent, induced . . . under color of official right."

I agree with the Court, on the other hand, that the word "induced" does not "necessarily indicat[e] that the transaction must be *initiated* by the" public official. *Ante*, at 266 (emphasis in original). Something beyond the mere acceptance of property from another is required, however, or else the word "induced" would be superfluous. That something, I submit, is the *quid pro quo*. The ability of the official to use or refrain from using authority is the "color of official right" which can be invoked in a corrupt way to induce payment of money or to otherwise obtain property. The inducement generates a *quid pro quo*, under color of official right, that the statute prohibits. The term "under color of" is used, as I think both the Court and the dissent agree, to

sweep within the statute those corrupt exercises of authority that the law forbids but that nevertheless cause damage because the exercise is by a governmental official. Cf. *Monroe* v. *Pape*, 365 U. S. 167, 184 (1961) ("'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law'") (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)).

The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official violates § 1951 if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied. The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.

The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor. See *McCormick* v. *United States*, 500 U. S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider"). In this respect a prosecution under the statute has some similarities to a contract dispute, with the added and vital element that motive is crucial. For example, a *quid pro quo* with the attendant corrupt motive can be inferred from an ongoing course of conduct. Cf. *United States* v. *O'Grady*, 742 F. 2d 682, 694 (CA2 1984) (Pierce, J., concurring). In such instances, for a public official to commit extortion under color of official right, his course of dealings must establish a real understanding that failure to make

a payment will result in the victimization of the prospective payor or the withholding of more favorable treatment, a victimization or withholding accomplished by taking or refraining from taking official action, all in breach of the official's trust. See Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815, 887–888 (1988) (observing that the offense of official extortion has always focused on public corruption).

Thus, I agree with the Court, that the *quid pro quo* requirement is not simply made up, as the dissent asserts. *Post*, at 287. Instead, this essential element of the offense is derived from the statutory requirement that the official receive payment under color of official right, see *ante*, at 268, n. 20, as well as the inducement requirement. And there are additional principles of construction which justify this interpretation. First is the principle that statutes are to be construed so that they are constitutional. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988), and cases cited therein. As one Court of Appeals Judge who agreed with the construction the Court today adopts noted, "the phrase 'under color of official right,' standing alone, is vague almost to the point of unconstitutionality." *United States* v. *O'Grady*, *supra*, at 695 (Van Graafeiland, J., concurring in part and dissenting in part) (citing *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982)). By placing upon a criminal statute a narrow construction, we avoid the possibility of imputing to Congress an enactment that lacks necessary precision.

Moreover, the mechanism which controls and limits the scope of official right extortion is a familiar one: a state of mind requirement. See *Morissette* v. *United States*, 342 U. S. 246 (1952) (refusing to impute to Congress the intent to create a strict liability crime despite the absence of any explicit *mens rea* requirement in the statute). Hence, even

if the *quid pro quo* requirement did not have firm roots in the statutory language, it would constitute no abuse of judicial power for us to find it by implication.

Morissette legitimates the Court's decision in an additional way. As both the Court and the dissent agree, compare *ante*, at 260, n. 4, with *post*, at 288, n. 5, Congress' choice of the phrase "under color of official right" rather than "by colour of his office" does not reflect a substantive modification of the common law. Instead, both the Court and dissent conclude that the language at issue here must be interpreted in light of the familiar principle that absent any indication otherwise, Congress meant its words to be interpreted in light of the common law. *Morissette*, *supra*, at 263. As to the meaning of the common law, I agree with the Court's analysis and therefore join Part III of the Court's opinion.

While the dissent may well be correct that prior to the enactment of the Hobbs Act a large number of the reported official extortion cases in the United States happened to involve false pretenses, those cases do not so much as hint that a false pretense of right was ever considered as an essential element of the offense. See, *e. g.*, *People* v. *Whaley*, 6 Cow. 661, 663–664 (N. Y. Sup. Ct. 1827) ("Extortion signifies, in an enlarged sense, any oppression under color of right. In a stricter sense, it signifies the taking of money by any officer, by color of his office; either, where none at all is due, or not so much due, or when it is not yet due"); *Hanley* v. *State*, 125 Wis. 396, 401–402, 104 N. W. 57, 59 (1905) ("The common-law offense of extortion is said 'to be an abuse of public justice, which consists in any officer's unlawfully taking by color of his office, from any man, any money or thing of value that is not due him, or more than is due him, or before it is due'") (quoting 4 W. Blackstone, Commentaries *141). Furthermore, as the Court demonstrates, see *ante*, at 269–270, during the same period other American courts affirmed convictions of public officials for extortion based upon corrupt receipt of payment absent any claim of right.

Morissette is relevant in one final respect. As I have indicated, and as the jury instructions in this case made clear, an official violates the statute only if he agrees to receive a payment not due him in exchange for an official act, knowing that he is not entitled to the payment. See App. 13 (requiring "wrongful use of otherwise valid official power"). Modern courts familiar with the principle that only a clear congressional statement can create a strict liability offense, see *Morissette*, *supra*, understand this fundamental limitation. I point it out only because the express terms of the common-law definition of official extortion do not state the requirement that the official's intent be corrupt, see, *e. g.*, *Whaley*, *supra*, at 663–664; *Hanley*, *supra*, at 401–402, 104 N. W., at 59; Lindgren, 35 UCLA L. Rev., at 870–871 (setting forth six colonial-era definitions of official extortion), and some courts in this country appear to have taken the view that the common-law offense had no *mens rea* requirement. See, *e. g.*, *Commonwealth* v. *Bagley*, 24 Mass. 279, 281 (1828) (affirming the conviction "of an honest and meritorious public officer, who by misapprehension of his rights [had] demanded and received a lawful fee for a service not yet performed"). On the other hand, in other jurisdictions corrupt motive was thought to be an element of the offense. *E. g.*, *Whaley*, *supra*, at 664 (remarking that the jury found that the defendant accepted payment "with the corrupt intent charged in the indictment"). In any event, even if the rule had been otherwise at common law, our modern jurisprudence would require that there be a *mens rea* requirement now. In short, a public official who labors under the good-faith but erroneous belief that he is entitled to payment for an official act does not violate the statute. That circumstance is not, however, presented here.

The requirement of a *quid pro quo* in a § 1951 prosecution such as the one before us, in which it is alleged that money was given to the public official in the form of a campaign contribution, was established by our decision last Term in

McCormick v. *United States*, 500 U. S. 257 (1991). Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but in all § 1951 prosecutions. That is as it should be, for, given a corrupt motive, the *quid pro quo*, as I have said, is the essence of the offense.

Because I agree that the jury instruction in this case complied with the *quid pro quo* requirement, I concur in the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court's analysis is based on the premise, with which I fully agree, that when Congress employs legal terms of art, it "'knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind.'" *Ante*, at 259 (quoting *Morissette* v. *United States*, 342 U. S. 246, 263 (1952)). Thus, we presume, Congress knew the meaning of common-law extortion when it enacted the Hobbs Act, 18 U. S. C. § 1951. Unfortunately, today's opinion misapprehends that meaning and misconstrues the statute. I respectfully dissent.

I

Extortion is one of the oldest crimes in Anglo-American jurisprudence. See 3 E. Coke, Institutes *541. Hawkins provides the classic common-law definition: "[I]t is said, that Extortion in a large Sense signifies any Oppression *under Colour of Right;* but that in a strict Sense it signifies the Taking of Money by any Officer, *by Colour of his Office*, either where none at all is due, or not so much is due, or where it is not yet due." 1 W. Hawkins, Pleas of the Crown 170 (2d ed. 1724) (emphasis added). Blackstone echoed that definition: "[E]xtortion is an abuse of public justice, which

consists in any officer's unlawfully taking, *by colour of his office*, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." 4 W. Blackstone, Commentaries 141 (1769) (emphasis added).

These definitions pose, but do not answer, the critical question: What does it mean for an official to take money "by colour of his office"? The Court fails to address this question, simply assuming that common-law extortion encompassed *any* taking by a public official of something of value that he was not "due." *Ante*, at 260.

The "under color of office" element of extortion, however, had a definite and well-established meaning at common law. "At common law it was essential that the money or property be obtained under color of office, *that is, under the pretense that the officer was entitled thereto by virtue of his office.* The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." 3 R. Anderson, Wharton's Criminal Law and Procedure § 1393, pp. 790–791 (1957) (emphasis added).[1] Thus, although the Court purports to

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[1] That was straightforward black-letter law at the time the Hobbs Act was passed in 1946, and continues to be straightforward black-letter law today. See, *e. g.*, 1 W. Burdick, Law of Crime § 275, p. 395 (1946) ("At common law, the money or other thing of value must be taken under color of office. That is, the service rendered, or to be rendered, or pretended to have been rendered, must be apparently, or pretended to be, *within official power or authority, and the money must be taken in such an apparent or claimed capacity*") (emphasis added; footnotes omitted); 31A Am. Jur. 2d § 11, p. 600 (1989) ("In order to constitute extortion, the taking must take place under color of office—that is, *under the pretense that the officer is entitled to the fee by virtue of his or her office.* This requires that the service rendered must be apparently, or pretended to be, within official power or authority, and the money *must be taken in such apparent or claimed authority*") (emphasis added; footnotes omitted). Cf. 7 Cyclopedia of Law and Procedure 401–402 (1903) (defining "color of office" as "a pretense of official right to do an act made by one who has no such right; the mere semblance, shadow, or false appearance of official authority; the dissembling face of the right of office; the use of official authority as a

define official extortion under the Hobbs Act by reference to the common law, its definition bears scant resemblance to the common-law crime Congress presumably codified in 1946.

A

The Court's historical analysis rests upon a theory set forth in one law review article. See *ante*, at 260, and nn. 4–6 (citing Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815 (1988)). Focusing on early English cases, the article argues that common-law extortion encompassed a wide range of official takings, whether by coercion, false pretenses, or bribery. Whatever the merits of that argument as a description of early English common law,[2] it is

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pretext or cover for the commission of some corrupt or vicious act; an act evilly done, by the countenance of an office; an act unjustly done by the countenance of an office; an act wrongfully done by an officer under the pretended authority of his office; and is always taken in the worst sense, being grounded upon corruption, of which the office is as a mere shadow or color; under statutes, the phrase is used to define an illegal claim of right or authority to take the security; some illegal exertion of authority, whereby an obligation is extorted which the statute does not require to be given") (footnotes omitted).

[2]Those merits are far from clear. Most commentators maintain that extortion and bribery were distinct crimes at early English common law. See, *e. g.*, J. Noonan, Bribes 398, 585–587 (1984); Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L. J. 1171, 1179–1180 (1977). While—as I explain below—Professor Lindgren may well be correct that common-law extortion did not contain an "inducement" element, in my view he does not adequately account for the crime's "by color of office" element. This latter element has existed since long before the founding of the Republic, and cannot simply be ignored. As Chief Justice Mountague explained over four centuries ago, *colore officii sui* ("by color of his office") "signifies an Act badly done *under the Countenance of an Office*, and it bears *a dissembling Visage of Duty*, and is properly called Extortion." *Dive* v. *Maningham*, 1 Plowd. 60, 68, 75 Eng. Rep. 96, 108 (C. B. 1550) (emphasis added). See also 3 E. Coke, Institutes *542 (describing extortion as "more odious than

beside the point here—the critical inquiry for our purposes is the American understanding of the crime at the time the Hobbs Act was passed in 1946. Cf. *Harmelin* v. *Michigan*, 501 U. S. 957, 975 (1991) (plurality opinion) (English historical background is relevant in determining the meaning of a constitutional provision, but the "ultimate question" is the meaning of that provision to the Americans who adopted it).

A survey of 19th- and early 20th-century cases construing state extortion statutes in light of the common law makes plain that the offense was understood to involve not merely a wrongful taking by a public official, but a wrongful taking *under a false pretense of official right.* A typical case is *Collier* v. *State*, 55 Ala. 125 (1877). The defendant there was a local prosecutor who, for a fee, had given legal advice to a criminal suspect. The Alabama Supreme Court rejected the State's contention that the defendant's receipt of the fee—even though improper—amounted to "extortion," because he had not taken the money "under color of his office." "The object of the [extortion] statute is . . . not the obtaining money by mere impropriety of conduct, or by fraud, by persons filling official position." *Id.*, at 127. Rather, the court explained, "[a] taking under color of office is of the essence of the offense. *The money or thing received must have been claimed, or accepted, in right of office, and the person paying must have been yielding to official authority.*" *Id.*, at 128 (emphasis added). That a public official took money he was not due was not enough. "[T]hough the defendant may have been guilty of official infidelity, the wrong was to the State only, and no wrong was done the person paying the money. That wrong is not punishable under this indictment. Private and public wrong must concur, to constitute

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robbery; for robbery is apparent, and hath the face of a crime, but *extortion puts on the visure of virtue*") (emphasis added).

extortion." *Ibid.* Numerous decisions from other jurisdictions confirm that an official obtained a payment "under color of his office" only—as the phrase suggests—when he used the office to assert a false pretense of official right to the payment.[3]

Because the Court misapprehends the "color of office" requirement, the crime it describes today is not the common-law crime that Congress presumably incorporated into the Hobbs Act. The explanation for this error is clear. The

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[3] See, *e. g.*, *People* v. *Whaley*, 6 Cow. 661 (N. Y. Sup. Ct. 1827) (affirming the extortion conviction of a justice of the peace who had charged a litigant a court fee when none was due); *Commonwealth* v. *Bagley*, 24 Mass. 279, 281 (1828) (affirming the extortion conviction of a deputy jailkeeper who had demanded and received a fee when none was due); *State* v. *Stotts*, 5 Black. 460, 460–461 (Ind. 1840) (affirming the extortion conviction of a constable who had charged a greater fee than was due for performance of his services); *State* v. *Burton*, 3 Ind. 93, 93–95 (1851) (affirming the extortion conviction of a county treasurer who had charged a fee for his services where none was due); *Williams* v. *State*, 34 Tenn. 160, 162 (1854) (affirming the extortion conviction of a county constable who had charged a fee for official services that he did not perform); *State* v. *Vasel*, 47 Mo. 416, 417–418 (1871) (affirming the extortion conviction of a deputy constable who had wrongfully collected a fee before it was legally due); *Cutter* v. *State*, 36 N. J. L. 125, 128 (1873) (reversing the extortion conviction of a justice of the peace who had charged for his services a fee to which he was not entitled, but may have done so under a mistaken belief of right); *Loftus* v. *State*, 19 A. 183, 184 (N. J. Ct. Err. App. 1890) (affirming the extortion conviction of a justice of the peace who had charged an excessive fee for his services); *Commonwealth* v. *Saulsbury*, 152 Pa. 554, 559–560, 25 A. 610, 611–612 (1893) (reversing, on evidentiary grounds, the extortion conviction of a deputy constable who had charged an excessive fee for his services); *Hanley* v. *State*, 125 Wis. 396, 401–402, 104 N. W. 57, 59 (1905) (affirming the extortion conviction of two constables who wrongfully demanded a fee for executing a warrant); *State* v. *Cooper*, 120 Tenn. 549, 552–554, 113 S. W. 1048, 1049 (1908) (reinstating the extortion indictment of a justice of the peace who had collected a fee as a bail bond before it was due); *Dean* v. *State*, 9 Ga. App. 303, 305–306, 71 S. E. 597, 598 (1911) (affirming the extortion conviction of a constable who had used his office to collect money that he was not due); cf. *La Tour* v. *Stone*, 139 Fla. 681, 693–694, 190 So. 704, 709 (1939) (describing common-law extortion).

Court's historical foray has the single-minded purpose of proving that common-law extortion did *not* include an element of "inducement"; in its haste to reach that conclusion, the Court fails to consider the elements that common-law extortion *did* include. Even if the Court were correct that an official *could* commit extortion at common law simply by receiving (but not "inducing") an unlawful payment, it does not follow either historically or logically that an official *automatically* committed extortion whenever he received such a payment.

The Court, therefore, errs in asserting that common-law extortion is the "rough equivalent of what we would now describe as 'taking a bribe.'" *Ante*, at 260. *Regardless* of whether extortion contains an "inducement" requirement, bribery and extortion are different crimes. An official who solicits or takes a bribe does *not* do so "under color of office"; *i. e.*, under any pretense of official entitlement. "The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in *demanding* a fee or present *by color of office.*" *State* v. *Pritchard*, 107 N. C. 921, 929, 12 S. E. 50, 52 (1890) (emphasis added). Where extortion is at issue, the public official is the sole wrongdoer; because he acts "under color of office," the law regards the payor as an innocent victim and not an accomplice. See, *e. g.*, 1 W. Burdick, Law of Crime §§ 273–275, pp. 392–396 (1946). With bribery, in contrast, the payor *knows* the recipient official is not entitled to the payment; he, as well as the official, may be punished for the offense. See, *e. g.*, *id.*, §§ 288–292, at 426–436. Congress is well aware of the distinction between the crimes; it has always treated them separately. Compare 18 U. S. C. § 872 ("*[e]xtortion* by officers or employees of the United States" (emphasis added), which criminalizes extortion by federal officials, and makes no provision for punishment of the payor), with 18 U. S. C. § 201 ("*[b]ribery* of public officials and witnesses" (emphasis added), which criminalizes bribery of and

by federal officials). By stretching the bounds of extortion to make it encompass bribery, the Court today blurs the traditional distinction between the crimes.[4]

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[4]The Court alleges a "complete absence of support" for the definition of common-law extortion set forth in this dissent, and cites five American cases that allegedly support its understanding of the crime. *Ante*, at 269–271. The Court is mistaken on both counts: even a brief perusal of 19th- and early 20th-century cases, as well as treatises and hornbooks, shows that my description of the crime is anything but novel, and the cases cited by the Court in no way support its argument.

The Court first cites two intermediate-court cases from Pennsylvania, *Commonwealth* v. *Wilson*, 30 Pa. Super. 26 (1906), and *Commonwealth* v. *Brown*, 23 Pa. Super. 470 (1903). Those opinions, both written by one Judge Rice, display an obvious misunderstanding of the meaning of "color of office." Citing the definition of that phrase set forth in the Cyclopedia of Law and Practice, see n. 1, *supra*, the Court confuses a false pretense of official authority *to receive a payment* with a false pretense of official authority *to do an official act*. See *Wilson*, *supra*, at 31 ("Bribery on the part of an officer and extortion are not identical, but they are very closely allied; and whilst the former does not necessarily involve a pretense of official authority *to do the act for which the bribe is given*, yet, if such pretense is used *to induce* its payment, we see no reason to doubt that the taking of it is common-law extortion as well as bribery") (emphasis added). But, as Hawkins, Blackstone, and all other expositors of black-letter law make clear, the crux of common-law extortion was the unlawful taking of money by color of office, *not* the unlawful taking of money to do an act by color of office.

In any event, the Pennsylvania court's unorthodox understanding of common-law extortion in no way supports the Court's definition of the crime, as the Pennsylvania court explicitly required a pretense of authority to *induce* the unlawful payment—precisely the requirement the Court today rejects. See also *Commonwealth* v. *Francis*, 201 Pa. Super. 313, 322–323, 191 A. 2d 884, 889 (1963) (citing *Wilson* and *Brown* for the proposition that "the extraction of money or other things of value *under a threat of using the power of one's office* may constitute extortion" and explaining that "[a]lthough we have recognized that the crimes of common law extortion and bribery may coincide at times, . . . it is generally held that they are mutually exclusive crimes") (emphasis added).

The third case cited by the Court, *State* v. *Sweeney*, 180 Minn. 450, 231 N. W. 225 (1930), does not involve extortion at all—it upheld a Minneapolis alderman's conviction for *bribery*. At trial on one charge of receiving a

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Perhaps because the common-law crime—as the Court defines it—is so expansive, the Court, at the very end of its opinion, appends a qualification: "We hold today that the

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bribe, the State introduced evidence that the defendant had received other bribes, some from gambling houses. He challenged the admission of the evidence of other crimes; the court rejected that challenge on evidentiary grounds. In passing, however, the court said: "It may be noted, however, that *it may be* that the defendant and [another alderman], in dealing with the gambling houses, were guilty of extortion under [the state statute]." *Id.*, at 456, 231 N. W., at 228 (emphasis added). That is all. The Court's parenthetical claim that "dicta" in the opinion support the proposition that "alderman's acceptance of money for the erection of a barn, the running of a gambling house, and the opening of a filling station *would* constitute extortion" is, at best, a gross overstatement. *Ante*, at 270.

Fourth, the Court cites *State* v. *Barts*, 132 N. J. L. 74, 76, 83, 38 A. 2d 838, 841, 844 (1944), which upheld the extortion conviction of a police officer, based essentially on a bribery rationale. As the New Jersey Supreme Court has neatly explained, however, that case represented a *departure* from the traditional common law of extortion:

"Our extortion statute, which had its origin at least as early as 1796, appears on its face to have been originally intended to be reiterative of the common law. The essence of that offense was the receiving or taking by any public officer, by color of his office, of any fee or reward not allowed by law for performing his duties. The purpose would seem to be simply *to penalize the officer who non-innocently insisted upon a larger fee than he was entitled to or a fee where none was permitted or required to be paid for the performance of an obligatory function of his office.* The matter was obviously of particular importance in the days when public officials received their compensation through fees collected and not by fixed salary. Our early cases dealt with precisely this kind of a situation. [Citing, *inter alia*, *Cutter* v. *State* and *Loftus* v. *State*, see n. 3, *supra*].

"After a couple of opinions possibly indicating an extension to cover payments demanded for the favorable exercise of discretionary powers of the officer, *an enlarged construction of the statute to its present day scope* was announced in *State* v. *Barts* . . . . This *present* construction of the crime thus overlaps the offense of bribery since extortion is committed even where the object of the payment is in reality to influence an officer in his official behavior or conduct without such having to be established." *State* v. *Begyn*, 34 N. J. 35, 46–47, 167 A. 2d 161, 166–167 (1961) (emphasis added; citations omitted). If the Court wishes to adopt the "modern"

Government need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts.*" *Ante*, at 268 (emphasis added). This *quid pro quo* requirement is simply made up. The Court does not suggest that it has any basis in the common law or the language of the Hobbs Act, and I have found no treatise or dictionary that refers to any such requirement in defining "extortion."

Its only conceivable source, in fact, is our opinion last Term in *McCormick* v. *United States*, 500 U. S. 257 (1991). Quite sensibly, we insisted in that case that, unless the Government established the existence of a *quid pro quo*, a public official could not be convicted of extortion under the Hobbs Act for accepting a campaign contribution. We did not purport to discern that requirement in the common law or statutory text, but imposed it to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life. "To

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view of extortion, fine; but it should not attempt to present that view as "common-law history."

Finally, the Court cites *White* v. *State*, 56 Ga. 385 (1876). There the Georgia Supreme Court reversed the extortion conviction of a special constable who was charged with improperly keeping a fee that he had collected. The court first explained that a transaction was *not* extortion if the defendant "took the money in good faith, *without any claim to it.*" *Id.*, at 389 (emphasis added). The court then went on, in dicta, to assert that if an officer "should use his authority, or any process of law in his hands, for the purpose of *awing or seducing* any person into paying him a bribe, that would, doubtless, be extortion." *Ibid.* (emphasis added). For this latter proposition the Georgia court cited no authority. The court's error is manifest: it confused the common-law meaning of extortion (an officer wrongfully taking money under color of his office) with the colloquial meaning of the term (which conjures up coercion, and thus is at once broader and narrower than the common law). To the extent that *White*'s dicta cuts against my understanding of common-law extortion, of course, it cuts equally strongly against the Court's, for, like the Pennsylvania cases cited earlier in this footnote, it quite obviously requires that the extorted payment be "induced" by the officer—the very requirement the Court today rejects.

hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion." *Id.*, at 272–273. We expressly limited our holding to campaign contributions. *Id.*, at 274, n. 10 ("[W]e do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value").

Because the common-law history of extortion was neither properly briefed nor argued in *McCormick*, see *id.*, at 268, n. 6; *id.*, at 276–277 (SCALIA, J., concurring), the *quid pro quo* limitation imposed there represented a reasonable first step in the right direction. Now that we squarely consider that history, however, it is apparent that that limitation was in fact overly modest: at common law, McCormick was innocent of extortion *not* because he failed to offer a *quid pro quo* in return for campaign contributions, but because he did not take the contributions under color of official right. Today's extension of *McCormick*'s reasonable (but textually and historically artificial) *quid pro quo* limitation to *all* cases of official extortion is both unexplained and inexplicable—except insofar as it may serve to rescue the Court's definition of extortion from substantial overbreadth.

II

As serious as the Court's disregard for history is its disregard for well-established principles of statutory construction. The Court chooses not only the harshest interpretation of a criminal statute, but also the interpretation that maximizes federal criminal jurisdiction over state and local officials. I would reject both choices.

A

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, *induced* by wrongful use of actual or threatened force, violence, or fear, or *under color of official right.*" 18 U. S. C. § 1951(b)(2) (emphasis added).[5] Evans argues, in part, that he did not "induce" any payment. The Court rejects that argument, concluding that the verb "induced" applies *only* to the first portion of the definition. *Ante*, at 265. Thus, according to the Court, the statute should read: "'The term "extortion" means the obtaining of property from another, with his consent, *either* [1] induced by wrongful use of actual or threatened force, violence, or fear, *or* [2] under color of official right.'" *Ante*, at 265, n. 15. That is, I concede, a *conceivable* construction of the words. But it is—at the very least—forced, for it sets up an unnatural and ungrammatical parallel between the *verb* "induced" and the *preposition* "under."

The more natural construction is that the verb "induced" applies to *both* types of extortion described in the statute. Thus, the unstated "either" belongs *after* "induced": "The term 'extortion' means the obtaining of property from another, with his consent, induced *either* [1] by wrongful use of actual or threatened force, violence, or fear, *or* [2] under color of official right." This construction comports with correct grammar and standard usage by setting up a parallel between two prepositional phrases, the first beginning with "by"; the second with "under."[6]

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[5] I have no quarrel with the Court's suggestion, see *ante* at 260, n. 4, that there is no difference of substance between the classic common-law phrase "by colour of his office" and the Hobbs Act's formulation "under color of official right." The Act's formulation, of course, only underscores extortion's essential element of a false assertion of *official right* to a payment.

[6] This is, moreover, the construction long espoused by the Justice Department. See U. S. Dept. of Justice, United States Attorneys' Manual § 9–131.180 (1984) ("[T]here is some question as to whether the Hobbs Act

Our duty in construing this criminal statute, then, is clear: "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally* v. *United States*, 483 U. S. 350, 359–360 (1987). See also *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). Because the Court's expansive interpretation of the statute is not the only plausible one, the rule of lenity compels adoption of the narrower interpretation. That rule, as we have explained on many occasions, serves two vitally important functions:

> "First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U. S. 336, 348 (1971) (citations omitted; footnote omitted).

Given the text of the statute and the rule of lenity, I believe that inducement is an element of official extortion under the Hobbs Act.

Perhaps sensing the weakness of its position, the Court suggests an alternative interpretation: even if the statute *does* set forth an "inducement" requirement for official extortion, that requirement is always satisfied, because "the coercive element is provided by the public office itself."

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defines [official] extortion as 'the obtaining of property from another under color of official right,' or as 'the obtaining of property from another, with his consent, *induced* under color of official right.'. . . [T]he grammatical structure of the Hobbs Act would appear to support the latter language") (emphasis added).

Ante, at 266. I disagree. A particular public official, to be sure, may wield his power in such a way as to coerce unlawful payments, even in the absence of any explicit demand or threat. But it ignores reality to assert that *every* public official, in *every* context, automatically exerts coercive influence on others by virtue of his office. If the chairman of General Motors meets with a local court clerk, for example, whatever implicit coercive pressures exist will surely not emanate from the clerk. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), of course, this Court established a presumption of "inherently compelling pressures" in the context of official custodial interrogation. *Id.*, at 467. Now, apparently, we assume that *all* public officials exude an aura of coercion at *all* places and at *all* times. That is not progress.

B

The Court's construction of the Hobbs Act is repugnant not only to the basic tenets of criminal justice reflected in the rule of lenity, but also to basic tenets of federalism. Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials. See generally Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L. J. 1171 (1977). That expansion was born of a single sentence in a Third Circuit opinion: "[The 'under color of official right' language in the Hobbs Act] repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress." *United States* v. *Kenny*, 462 F. 2d 1205, 1229, cert. denied, 409 U. S. 914 (1972). As explained above, that sentence is not necessarily incorrect in its description of what common-law extortion did *not* require; unfortunately, it omits an important part of what common-law extortion *did* require. By over-

looking the traditional meaning of "under color of official right," *Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both.

> "As effectively as if there were federal common law crimes, the court in *Kenny* . . . amend[ed] the Hobbs Act and [brought] into existence a new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun." J. Noonan, Bribes 586 (1984).

After *Kenny*, federal prosecutors came to view the Hobbs Act as a license for ferreting out *all* wrongdoing at the state and local level—"'a special code of integrity for public officials.'" *United States* v. *O'Grady*, 742 F. 2d 682, 694 (CA2 1984) (en banc) (quoting letter from Raymond J. Dearie, United States Attorney for the Eastern District of New York, to the United States Court of Appeals for the Second Circuit, dated Jan. 21, 1983). In short order, most other Circuits followed *Kenny*'s lead and upheld, based on a bribery rationale, the Hobbs Act extortion convictions of an astonishing variety of state and local officials, from a State Governor, see *United States* v. *Hall*, 536 F. 2d 313, 320–321 (CA10), cert. denied, 429 U. S. 919 (1976), down to a local policeman, see *United States* v. *Braasch*, 505 F. 2d 139, 151 (CA7 1974), cert. denied, 421 U. S. 910 (1975).

Our precedents, to be sure, suggest that Congress enjoys broad constitutional power to legislate in areas traditionally regulated by the States—power that apparently extends even to the direct regulation of the qualifications, tenure, and conduct of state governmental officials. See, *e. g.*, *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 547–554 (1985). As we emphasized only last Term, however, concerns of federalism require us to give a *narrow* construction to federal legislation in such sensitive areas unless

Congress' contrary intent is "unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) (internal quotation marks omitted). "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*, at 461. *Gregory*'s teaching is straightforward: because we "assume Congress does not exercise lightly" its extraordinary power to regulate state officials, *id.*, at 460, we will construe ambiguous statutory provisions in the least intrusive manner that can reasonably be inferred from the statute, *id.*, at 467.

Gregory's rule represents nothing more than a restatement of established law:

> "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . As this Court emphasized only last Term in *Rewis* v. *United States*, [401 U. S. 808 (1971)—a case involving the Hobbs Act's counterpart, the Travel Act], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States* v. *Bass*, 404 U. S., at 349 (footnote omitted).

Similarly, in *McNally* v. *United States*, 483 U. S. 350 (1987)—a case closely analogous to this one—we rejected the Government's contention that the federal mail fraud statute, 18 U. S. C. § 1341, protected the citizenry's "intangible right" to good government, and hence could be applied to all instances of state and local corruption. Such an expansive reading of

the statute, we noted with disapproval, would "leav[e] its outer boundaries ambiguous and involv[e] the Federal Government in setting standards of disclosure and good government for local and state officials."[7] Cf. Baxter, Federal Dis-

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[7] Prior to our decision in *McNally*, the Government's theory had been accepted by every Court of Appeals to consider the issue. We did not consider that acceptance to cure the ambiguity we perceived in the statutory language; we simply reiterated the traditional learning that a federal criminal statute, particularly as applied to state officials, must be construed narrowly. See 483 U. S., at 359–360. "If Congress desires to go further," we said, "it must speak more clearly than it has." *Id.*, at 360.

The dissent in *McNally* argued strenuously that the Court's interpretation of the statute should be informed by the majority view among the Courts of Appeals and Congress' subsequent silence:

"Perhaps the most distressing aspect of the Court's action today is its casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. . . . I [can]not join a rejection of such a longstanding, consistent interpretation of a federal statute. See *Commissioner of Internal Revenue* v. *Fink*, 483 U. S. 89, 101 (1987) (STEVENS, J., dissenting); *Citicorp Industrial Credit, Inc.* v. *Brock*, 483 U. S. 27, 40 (1987) (STEVENS, J., dissenting); *Runyon* v. *McCrary*, 427 U. S. 160, 189 (1976) (STEVENS, J., concurring)." *Id.*, at 376–377 (opinion of STEVENS, J.).

The interpretation given a statute by a majority of the Courts of Appeals, of course, is due our most respectful consideration. Ultimately, however, our attention must focus on the *reasons* given for that interpretation. Error is not cured by repetition, and we do not discharge our duty simply by counting up the circuits on either side of the split. Here, the minority position of the Second and Ninth Circuits (both en banc) is far more thoughtfully reasoned than the position of the majority of Circuits, which have followed the Third Circuit's lead in *United States* v. *Kenny*, 462 F. 2d 1205 (1972), "without setting forth a reasoned elaboration for their conclusions." *United States* v. *Cerilli*, 603 F. 2d 415, 427, and n. 5 (CA3 1979) (Aldisert, J., dissenting). Moreover, I reject the notion—as this Court has on many occasions—that Congress, through its silence, implicitly ratifies judicial decisions. See, *e. g.*, *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional ap-

cretion in the Prosecution of Local Political Corruption, 10 Pepp. L. Rev. 321, 336–343 (1983).

The reader of today's opinion, however, will search in vain for any consideration of the principles of federalism that animated *Gregory*, *Rewis*, *Bass*, and *McNally*. It is clear, of course, that the Hobbs Act's proscription of extortion "under color of official right" applies to all public officials, including those at the state and local level. As our cases emphasize, however, even when Congress has clearly decided to engage in *some* regulation of the state governmental officials, concerns of federalism play a vital role in evaluating the *scope* of the regulation.[8] The Court today mocks this jurisprudence by reading two significant limitations (the textual requirement of "inducement" and the common-law requirement of "under color of office") *out* of the Hobbs Act's definition of official extortion.

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proval" of judicial interpretation of a statute) (internal quotation marks omitted).

I find it unfortunate that the arguments we rejected in *McNally* today become the law of the land. See *ante*, at 268–269 ("Our conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way. Moreover, given the number of appellate court decisions . . . it is obvious that Congress is aware of the prevailing view" and has ratified that view through its silence).

[8]This case is, if anything, more compelling than *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991). In both cases, Congress clearly chose to engage in some regulation of state governmental officials. In *Gregory*, however, that regulation was sweeping on its face, and our task was to construe an *exemption* from that otherwise broad coverage. We decided the case on the ground that the exemption must be *assumed* to include judges unless a contrary intent were manifest. "[I]n this case we are not looking for a plain statement that judges are excluded. We will not read the [statute] to cover state judges unless Congress has made it clear that judges are *included*. . . . [I]t must be plain to anyone reading the Act that it covers judges." *Id.*, at 467. Here, in contrast, our task is to construe the primary scope of the Hobbs Act.

III

I have no doubt that today's opinion is motivated by noble aims. Political corruption at any level of government is a serious evil, and, from a policy perspective, perhaps one well suited for federal law enforcement. But federal judges are not free to devise new crimes to meet the occasion. Chief Justice Marshall's warning is as timely today as ever: "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States* v. *Wiltberger*, 5 Wheat., at 96.

Whatever evils today's opinion may redress, in my view, pale beside those it will engender. "Courts must resist th[e] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government." *United States* v. *Mazzei*, 521 F. 2d 639, 656 (CA3 1975) (en banc) (Gibbons, J., dissenting). All Americans, including public officials, are entitled to protection from prosecutorial abuse. Cf. *Morrison* v. *Olson*, 487 U. S. 654, 727–732 (1988) (SCALIA, J., dissenting). The facts of this case suggest a depressing erosion of that protection.

Petitioner Evans was elected to the Board of Commissioners of DeKalb County, Georgia, in 1982. He was no local tyrant—just one of five part-time commissioners earning an annual salary of approximately $16,000. The board's activities were entirely local, including the quintessentially local activity of zoning property. The United States does not suggest that there were any allegations of corruption or malfeasance against Evans.

In early 1985, as part of an investigation into "allegations of public corruption in the Atlanta area," a Federal Bureau of Investigation agent, Clifford Cormany, Jr., set up a bogus firm, "WDH Developers," and pretended to be a land developer. Cormany sought and obtained a meeting with Evans.

From March 1985 until October 1987, a period of some *two and a half years*, Cormany or one of his associates held 33 conversations with Evans. Every one of these contacts was initiated by the agents. During these conversations, the agents repeatedly requested Evans' assistance in securing a favorable zoning decision, and repeatedly brought up the subject of campaign contributions. Agent Cormany eventually contributed $8,000 to Evans' reelection campaign, and Evans accepted the money. There is no suggestion that he claimed an official entitlement to the payment. Nonetheless, he was arrested and charged with Hobbs Act extortion.

The Court is surely correct that there is sufficient evidence to support the jury's verdict that Evans committed "extortion" under the Court's expansive interpretation of the crime. But that interpretation has no basis in the statute that Congress passed in 1946. If the Court makes up this version of the crime today, who is to say what version it will make up tomorrow when confronted with the next perceived rascal? Until now, the Justice Department, with good reason, has been extremely cautious in advancing the theory that official extortion contains no inducement requirement. "*Until the Supreme Court decides upon the validity of this type of conviction*, prosecutorial discretion should be used to insure that any case which might reach that level of review is worthy of federal prosecution. Such restraint would require that only significant amounts of money and reasonably high levels of office should be involved." See U. S. Dept. of Justice, United States Attorneys' Manual § 9–131.180 (1984) (emphasis added). Having detected no "[s]uch restraint" in this case, I certainly have no reason to expect it in the future.

Our criminal justice system runs on the premise that prosecutors will respect, and courts will enforce, the boundaries on criminal conduct set by the legislature. Where, as here, those boundaries are breached, it becomes impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins. The potential for

abuse, of course, is particularly grave in the inherently political context of public corruption prosecutions.

In my view, Evans is plainly innocent of extortion.[9] With all due respect, I am compelled to dissent.

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[9] Evans also was convicted of filing a false income tax return. He now challenges that conviction on the ground that the jury was given improper instructions. He did not, however, challenge those instructions at trial or in the Court of Appeals. Thus, his current challenge is not properly before this Court. See *Delta Air Lines, Inc.* v. *August*, 450 U. S. 346, 362 (1981); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

Syllabus

QUILL CORP. *v.* NORTH DAKOTA, BY AND THROUGH ITS TAX COMMISSIONER, HEITKAMP

CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

No. 91–194. Argued January 22, 1992—Decided May 26, 1992

Respondent North Dakota, through its Tax Commissioner, filed an action in state court to require petitioner Quill Corporation—an out-of-state mail-order house with neither outlets nor sales representatives in the State—to collect and pay a use tax on goods purchased for use in the State. The trial court ruled in Quill's favor. It found the case indistinguishable from *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, which, in holding that a similar Illinois statute violated the Fourteenth Amendment's Due Process Clause and created an unconstitutional burden on interstate commerce, concluded that a "seller whose only connection with customers in the State is by common carrier or the . . . mail" lacked the requisite minimum contacts with the State. *Id.*, at 758. The State Supreme Court reversed, concluding, *inter alia*, that, pursuant to *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, and its progeny, the Commerce Clause no longer mandated the sort of physical-presence nexus suggested in *Bellas Hess;* and that, with respect to the Due Process Clause, cases following *Bellas Hess* had not construed minimum contacts to require physical presence within a State as a prerequisite to the legitimate exercise of state power.

Held:

1. The Due Process Clause does not bar enforcement of the State's use tax against Quill. This Court's due process jurisprudence has evolved substantially since *Bellas Hess*, abandoning formalistic tests focused on a defendant's presence within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of the federal system of Government, to require it to defend the suit in that State. See *Shaffer* v. *Heitner*, 433 U. S. 186, 212. Thus, to the extent that this Court's decisions have indicated that the Clause requires a physical presence in a State, they are overruled. In this case, Quill has purposefully directed its activities at North Dakota residents, the magnitude of those contacts are more than sufficient for due process purposes, and the tax is related to the benefits Quill receives from access to the State. Pp. 305–308.

2. The State's enforcement of the use tax against Quill places an unconstitutional burden on interstate commerce. Pp. 309–319.

Syllabus

(a) *Bellas Hess* was not rendered obsolete by this Court's subsequent decision in *Complete Auto*, *supra*, which set forth the four-part test that continues to govern the validity of state taxes under the Commerce Clause. Although *Complete Auto* renounced an analytical approach that looked to a statute's formal language rather than its practical effect in determining a state tax statute's validity, the *Bellas Hess* decision did not rely on such formalism. Nor is *Bellas Hess* inconsistent with *Complete Auto*. It concerns the first part of the *Complete Auto* test and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause. Pp. 309–312.

(b) Contrary to the State's argument, a mail-order house may have the "minimum contacts" with a taxing State as required by the Due Process Clause and yet lack the "substantial nexus" with the State required by the Commerce Clause. These requirements are not identical and are animated by different constitutional concerns and policies. Due process concerns the fundamental fairness of governmental activity, and the touchstone of due process nexus analysis is often identified as "notice" or "fair warning." In contrast, the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy. Pp. 312–313.

(c) The evolution of this Court's Commerce Clause jurisprudence does not indicate repudiation of the *Bellas Hess* rule. While cases subsequent to *Bellas Hess* and concerning other types of taxes have not adopted a bright-line, physical-presence requirement similar to that in *Bellas Hess*, see, *e. g.*, *Standard Pressed Steel Co.* v. *Department of Revenue of Wash.*, 419 U. S. 560, their reasoning does not compel rejection of the *Bellas Hess* rule regarding sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the rule remains good law. Pp. 314–318.

(d) The underlying issue here is one that Congress may be better qualified to resolve and one that it has the ultimate power to resolve. Pp. 318–319.

470 N. W. 2d 203, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 319. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 321.

Counsel

John E. Gaggini argued the cause for petitioner. With him on the briefs were *Don S. Harnack, Richard A. Hanson, James H. Peters, Nancy T. Owens,* and *William P. Pearce.*

Nicholas J. Spaeth, Attorney General of North Dakota, argued the cause for respondent. With him on the brief were *Laurie J. Loveland,* Solicitor General, *Robert W. Wirtz,* Assistant Attorney General, and *Alan H. Friedman,* Special Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New Hampshire et al. by *John P. Arnold,* Attorney General of New Hampshire, and *Harold T. Judd,* Senior Assistant Attorney General, *Charles M. Oberly III,* Attorney General of Delaware, and *John R. McKernan, Jr.,* Governor of Maine; for the American Bankers Association et al. by *John J. Gill III, Michael F. Crotty,* and *Frank M. Salinger;* for the American Council for the Blind et al. by *David C. Todd* and *Timothy J. May;* for Arizona Mail Order Co., Inc., et al. by *Maryann B. Gall, Timothy B. Dyk, Michael J. Meehan, Frank G. Julian, David J. Bradford, George S. Isaacson, Martin I. Eisenstein,* and *Stuart A. Smith;* for Carrot Top Industries, Inc., et al. by *Charles A. Trost* and *James F. Blumstein;* for the Clarendon Foundation by *Ronald D. Maines;* for the Coalition for Small Direct Marketers by *Richard J. Leighton* and *Dan M. Peterson;* for the Direct Marketing Association by *George S. Isaacson, Martin I. Eisenstein,* and *Robert J. Levering;* for the National Association of Manufacturers et al. by *Bruce J. Ennis, Jr., David W. Ogden, Jan S. Amundson,* and *John Kamp;* for Magazine Publishers of America, Inc., et al. by *Eli D. Minton, James R. Cregan, Ian D. Volner,* and *Stephen F. Owen, Jr.;* and for the Tax Executives Institute, Inc., by *Timothy J. McCormally.*

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Richard Blumenthal,* Attorney General of Connecticut, and *Paul J. Hartman, Charles W. Burson,* Attorney General of Tennessee, *Daniel E. Lungren,* Attorney General of California, *Winston Bryant,* Attorney General of Arkansas, *Robert A. Butterworth,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Larry EchoHawk,* Attorney General of Idaho, *Roland W. Burris,* Attorney General of Illinois, *Bonnie J. Campbell,* Attorney General of Iowa, *Frederic J. Cowan,* Attorney General of Kentucky, *William J. Guste, Jr.,* Attorney General of Louisiana, *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Scott Harshbarger,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Mike Moore,* Attorney General of Mississippi, *Frankie Sue Del Papa,* Attorney General of Nevada, *Robert*

JUSTICE STEVENS delivered the opinion of the Court.

This case, like *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), involves a State's attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State. In *Bellas Hess* we held that a similar Illinois statute violated the Due Process Clause of the Fourteenth Amendment and created an unconstitutional burden on interstate commerce. In particular, we ruled that a "seller whose only connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State. *Id.*, at 758.

In this case, the Supreme Court of North Dakota declined to follow *Bellas Hess* because "the tremendous social, economic, commercial, and legal innovations" of the past quarter-century have rendered its holding "obsole[te]." 470 N. W. 2d 203, 208 (1991). Having granted certiorari, 502 U. S. 808, we must either reverse the State Supreme Court

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Abrams, Attorney General of New York, *Lee Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *T. Travis Medlock*, Attorney General of South Carolina, *Dan Morales*, Attorney General of Texas, *Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, *Ken Eikenberry*, Attorney General of Washington, *Mario J. Palumbo*, Attorney General of West Virginia, and *John Payton;* for the State of New Jersey by *Robert J. Del Tufo*, Attorney General, *Sarah T. Darrow*, Deputy Attorney General, *Joseph L. Wannotti*, Assistant Attorney General, *Richard G. Taranto*, and *Joel I. Klein;* for the State of New Mexico by *Tom Udall*, Attorney General, and *Frank D. Katz*, Special Assistant Attorney General; for the City of New York by *O. Peter Sherwood*, *Edward F. X. Hart*, and *Stanley Buchsbaum;* for the International Council of Shopping Centers, Inc., et al. by *Charles Rothfeld;* for the Multistate Tax Commission by *James F. Flug* and *Martin Lobel;* for the National Governors' Association et al. by *Richard Ruda;* and for the Tax Policy Research Project by *Rita Marie Cain.*

or overrule *Bellas Hess*. While we agree with much of the state court's reasoning, we take the former course.

I

Quill is a Delaware corporation with offices and warehouses in Illinois, California, and Georgia. None of its employees work or reside in North Dakota, and its ownership of tangible property in that State is either insignificant or nonexistent.[1] Quill sells office equipment and supplies; it solicits business through catalogs and flyers, advertisements in national periodicals, and telephone calls. Its annual national sales exceed $200 million, of which almost $1 million are made to about 3,000 customers in North Dakota. It is the sixth largest vendor of office supplies in the State. It delivers all of its merchandise to its North Dakota customers by mail or common carrier from out-of-state locations.

As a corollary to its sales tax, North Dakota imposes a use tax upon property purchased for storage, use, or consumption within the State. North Dakota requires every "retailer maintaining a place of business in" the State to collect the tax from the consumer and remit it to the State. N. D. Cent. Code § 57–40.2–07 (Supp. 1991). In 1987, North Dakota amended the statutory definition of the term "retailer" to include "every person who engages in regular or system-

[1] In the trial court, the State argued that because Quill gave its customers an unconditional 90-day guarantee, it retained title to the merchandise during the 90-day period after delivery. The trial court held, however, that title passed to the purchaser when the merchandise was received. See App. to Pet. for Cert. A40–A41. The State Supreme Court assumed for the purposes of its decision that that ruling was correct. 470 N. W. 2d 203, 217, n. 13 (1991). The State Supreme Court also noted that Quill licensed a computer software program to some of its North Dakota customers that enabled them to check Quill's current inventories and prices and to place orders directly. *Id.*, at 216–217. As we shall explain, Quill's interests in the licensed software does not affect our analysis of the due process issue and does not comprise the "substantial nexus" required by the Commerce Clause. See n. 8, *infra*.

atic solicitation of a consumer market in th[e] state." § 57–40.2–01(6). State regulations in turn define "regular or systematic solicitation" to mean three or more advertisements within a 12-month period. N. D. Admin. Code § 81–04.1–01–03.1 (1988). Thus, since 1987, mail-order companies that engage in such solicitation have been subject to the tax even if they maintain no property or personnel in North Dakota.

Quill has taken the position that North Dakota does not have the power to compel it to collect a use tax from its North Dakota customers. Consequently, the State, through its Tax Commissioner, filed this action to require Quill to pay taxes (as well as interest and penalties) on all such sales made after July 1, 1987. The trial court ruled in Quill's favor, finding the case indistinguishable from *Bellas Hess;* specifically, it found that because the State had not shown that it had spent tax revenues for the benefit of the mail-order business, there was no "nexus to allow the state to define retailer in the manner it chose." App. to Pet. for Cert. A41.

The North Dakota Supreme Court reversed, concluding that "wholesale changes" in both the economy and the law made it inappropriate to follow *Bellas Hess* today. 470 N. W. 2d, at 213. The principal economic change noted by the court was the remarkable growth of the mail-order business "from a relatively inconsequential market niche" in 1967 to a "goliath" with annual sales that reached "the staggering figure of $183.3 billion in 1989." *Id.*, at 208, 209. Moreover, the court observed, advances in computer technology greatly eased the burden of compliance with a "'welter of complicated obligations'" imposed by state and local taxing authorities. *Id.*, at 215 (quoting *Bellas Hess*, 386 U. S., at 759–760).

Equally important, in the court's view, were the changes in the "legal landscape." With respect to the Commerce Clause, the court emphasized that *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), rejected the line of cases holding that the direct taxation of interstate commerce was

impermissible and adopted instead a "consistent and rational method of inquiry [that focused on] the practical effect of [the] challenged tax." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 443 (1980). This and subsequent rulings, the court maintained, indicated that the Commerce Clause no longer mandated the sort of physical-presence nexus suggested in *Bellas Hess.*

Similarly, with respect to the Due Process Clause, the North Dakota court observed that cases following *Bellas Hess* had not construed "minimum contacts" to require physical presence within a State as a prerequisite to the legitimate exercise of state power. The state court then concluded that "the Due Process requirement of a 'minimal connection' to establish nexus is encompassed within the *Complete Auto* test" and that the relevant inquiry under the latter test was whether "the state has provided some protection, opportunities, or benefit for which it can expect a return." 470 N. W. 2d, at 216.

Turning to the case at hand, the state court emphasized that North Dakota had created "an economic climate that fosters demand for" Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year. *Id.*, at 218–219. Based on these facts, the court concluded that Quill's "economic presence" in North Dakota depended on services and benefits provided by the State and therefore generated "a constitutionally sufficient nexus to justify imposition of the purely administrative duty of collecting and remitting the use tax." *Id.*, at 219.[2]

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[2] The court also suggested that, in view of the fact that the "touchstone of Due Process is fundamental fairness" and that the "very object" of the Commerce Clause is protection of interstate business against discriminatory local practices, it would be ironic to exempt Quill from this burden and thereby allow it to enjoy a significant competitive advantage over local retailers. 470 N. W. 2d, at 214–215.

II

As in a number of other cases involving the application of state taxing statutes to out-of-state sellers, our holding in *Bellas Hess* relied on both the Due Process Clause and the Commerce Clause. Although the "two claims are closely related," *Bellas Hess*, 386 U. S., at 756, the Clauses pose distinct limits on the taxing powers of the States. Accordingly, while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987).

The two constitutional requirements differ fundamentally, in several ways. As discussed at greater length below, see Part IV, *infra*, the Due Process Clause and the Commerce Clause reflect different constitutional concerns. Moreover, while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, see *International Shoe Co.* v. *Washington*, 326 U. S. 310, 315 (1945), it does not similarly have the power to authorize violations of the Due Process Clause.

Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct.

> "'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. . . . To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes 'undue.' But, though overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process

> objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones." *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 353 (1944) (Rutledge, J., concurring in part and dissenting in part).

Heeding Justice Rutledge's counsel, we consider each constitutional limit in turn.

III

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954), and that the "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State,'" *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978) (citation omitted). Here, we are concerned primarily with the first of these requirements. Prior to *Bellas Hess*, we had held that that requirement was satisfied in a variety of circumstances involving use taxes. For example, the presence of sales personnel in the State[3] or the maintenance of local retail stores in the State[4] justified the exercise of that power because the seller's local activities were "plainly accorded the protection and services of the taxing State." *Bellas Hess*, 386 U. S., at 757. The furthest extension of that power was recognized in *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960), in which the Court upheld a use tax despite the fact that all of the seller's in-state solicitation was performed by independent contractors. These cases all involved some sort of physical presence within the State, and in *Bellas Hess*

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[3] *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939).

[4] *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359 (1941).

the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary. We expressly declined to obliterate the "sharp distinction . . . between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." 386 U. S., at 758.

Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the area of judicial jurisdiction. Building on the seminal case of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316 (quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's "presence" within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State. In *Shaffer* v. *Heitner*, 433 U. S. 186, 212 (1977), the Court extended the flexible approach that *International Shoe* had prescribed for purposes of *in personam* jurisdiction to *in rem* jurisdiction, concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State. As we explained in *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462 (1985):

> "Jurisdiction in these circumstances may not be avoided merely because the defendant did not *physi-*

> *cally* enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.*, at 476 (emphasis in original).

Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." *Shaffer* v. *Heitner*, 433 U. S., at 218 (STEVENS, J., concurring in judgment). In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.

IV

Article I, § 8, cl. 3, of the Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." It says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, as Justice Johnson suggested in his concurring opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1, 231–232, 239 (1824), the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause, in Justice Stone's phrasing, "by its own force" prohibits certain state actions that interfere with interstate commerce. *South Carolina State Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938).

Our interpretation of the "negative" or "dormant" Commerce Clause has evolved substantially over the years, particularly as that Clause concerns limitations on state taxation powers. See generally P. Hartman, Federal Limitations on State and Local Taxation §§ 2:9–2:17 (1981). Our early cases, beginning with *Brown* v. *Maryland*, 12 Wheat. 419 (1827), swept broadly, and in *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888), we declared that "no State has the right to lay a tax on interstate commerce in any form." We later narrowed that rule and distinguished between direct burdens on interstate commerce, which were prohibited, and indirect burdens, which generally were not. See, *e. g.*, *Sanford* v. *Poe*, 69 F. 546 (CA6 1895), aff'd *sub nom. Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 220 (1897). *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 256–258 (1938), and subsequent decisions rejected this formal, categorical analysis and adopted a "multiple-taxation doctrine" that focused not on whether a tax was "direct" or "indirect" but rather on whether a tax subjected interstate commerce to a risk of multiple taxation. However, in *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946), we embraced again the formal distinction between direct and indirect taxation, invalidating Indiana's imposition of a gross receipts tax on a

particular transaction because that application would "impos[e] a direct tax on interstate sales." Most recently, in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S., at 285, we renounced the *Freeman* approach as "attaching constitutional significance to a semantic difference." We expressly overruled one of *Freeman*'s progeny, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), which held that a tax on "the privilege of doing interstate business" was unconstitutional, while recognizing that a differently denominated tax with the same economic effect would not be unconstitutional. *Spector*, as we observed in *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 441 (1959), created a situation in which "magic words or labels" could "disable an otherwise constitutional levy." *Complete Auto* emphasized the importance of looking past "the formal language of the tax statute [to] its practical effect," 430 U. S., at 279, and set forth a four-part test that continues to govern the validity of state taxes under the Commerce Clause.[5]

Bellas Hess was decided in 1967, in the middle of this latest rally between formalism and pragmatism. Contrary to the suggestion of the North Dakota Supreme Court, this timing does not mean that *Complete Auto* rendered *Bellas Hess* "obsolete." *Complete Auto* rejected *Freeman* and *Spector*'s formal distinction between "direct" and "indirect" taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on "legal terminology," "draftsmanship and phraseology." 430 U. S., at 281. *Bellas Hess*

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[5] Under our current Commerce Clause jurisprudence, "with certain restrictions, interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988); see also *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 623–624 (1981) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business") (internal quotation marks and citation omitted).

did not rely on any such labeling of taxes and therefore did not automatically fall with *Freeman* and its progeny.

While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases. Under *Complete Auto*'s four-part test, we will sustain a tax against a Commerce Clause challenge so long as the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U. S., at 279. *Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Thus, three weeks after *Complete Auto* was handed down, we cited *Bellas Hess* for this proposition and discussed the case at some length. In *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 559 (1977), we affirmed the continuing vitality of *Bellas Hess*' "sharp distinction . . . between mail-order sellers with [a physical presence in the taxing] State and those . . . who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." We have continued to cite *Bellas Hess* with approval ever since. For example, in *Goldberg* v. *Sweet*, 488 U. S. 252, 263 (1989), we expressed "doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. See *National Bellas Hess* . . . (receipt of mail provides insufficient nexus)." See also *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 33 (1988); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 626 (1981); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U. S., at 437; *National Geographic Society*, 430 U. S., at 559. For these reasons, we disagree with the State Supreme Court's conclu-

sion that our decision in *Complete Auto* undercut the *Bellas Hess* rule.

The State of North Dakota relies less on *Complete Auto* and more on the evolution of our due process jurisprudence. The State contends that the nexus requirements imposed by the Due Process and Commerce Clauses are equivalent and that if, as we concluded above, a mail-order house that lacks a physical presence in the taxing State nonetheless satisfies the due process "minimum contacts" test, then that corporation also meets the Commerce Clause "substantial nexus" test. We disagree. Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. See generally The Federalist Nos. 7, 11 (A. Hamilton). It is in this light that we have interpreted the negative implication of the Commerce Clause. Accordingly, we have ruled that that Clause prohibits discrimination against interstate commerce, see, *e. g.*, *Philadelphia* v. *New Jersey*, 437 U. S. 617 (1978), and bars state regulations that unduly burden interstate commerce, see, *e. g.*, *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662 (1981).

The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.[6] Thus, the "substantial nexus" requirement is not, like due process' "minimum contacts" requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to the State's suggestion, a corporation may have the "minimum contacts" with a taxing State as required by the Due Process Clause, and yet lack the "substantial nexus" with that State as required by the Commerce Clause.[7]

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[6] North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the *Bellas Hess* rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000-plus taxing jurisdictions. See *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753, 759–760 (1967) (noting that the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations") (footnotes omitted); see also Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 925–926 (1992).

[7] We have sometimes stated that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . due process requirement[s]." *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U. S. 358, 373 (1991). Although such comments might suggest that every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well

The State Supreme Court reviewed our recent Commerce Clause decisions and concluded that those rulings signaled a "retreat from the formalistic constrictions of a stringent physical presence test in favor of a more flexible substantive approach" and thus supported its decision not to apply *Bellas Hess*. 470 N. W. 2d, at 214 (citing *Standard Pressed Steel Co.* v. *Department of Revenue of Wash.*, 419 U. S. 560 (1975), and *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987)). Although we agree with the state court's assessment of the evolution of our cases, we do not share its conclusion that this evolution indicates that the Commerce Clause ruling of *Bellas Hess* is no longer good law.

First, as the state court itself noted, 470 N. W. 2d, at 214, all of these cases involved taxpayers who had a physical presence in the taxing State and therefore do not directly conflict with the rule of *Bellas Hess* or compel that it be overruled. Second, and more importantly, although our Commerce Clause jurisprudence now favors more flexible balancing analyses, we have never intimated a desire to reject all established "bright-line" tests. Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes, that silence does not imply repudiation of the *Bellas Hess* rule.

Complete Auto, it is true, renounced *Freeman* and its progeny as "formalistic." But not all formalism is alike. *Spector*'s formal distinction between taxes on the "privilege of doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." *Complete Auto*, 430 U. S., at 279. In contrast, the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue

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true: A tax may be consistent with due process and yet unduly burden interstate commerce. See, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987).

burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.[8]

Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: Whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office. Cf. *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551 (1977); *Scripto, Inc.* v. *Carson*, 362 U. S. 207 (1960). This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of

[8] In addition to its common-carrier contacts with the State, Quill also licensed software to some of its North Dakota clients. See n. 1, *supra*. The State "concedes that the existence in North Dakota of a few floppy diskettes to which Quill holds title seems a slender thread upon which to base nexus." Brief for Respondent 46. We agree. Although title to "a few floppy diskettes" present in a State might constitute some minimal nexus, in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 556 (1977), we expressly rejected a "'slightest presence' standard of constitutional nexus." We therefore conclude that Quill's licensing of software in this case does not meet the "substantial nexus" requirement of the Commerce Clause.

taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 457–458 (1959).

Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals.[9] Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.

Notwithstanding the benefits of bright-line tests, we have, in some situations, decided to replace such tests with more contextual balancing inquiries. For example, in *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375 (1983), we reconsidered a bright-line test set forth in *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83 (1927). *Attleboro* distinguished between state regulation of *wholesale* sales of electricity, which was constitutional as an "indirect" regulation of interstate commerce, and state regulation of *retail* sales of electricity, which was unconstitutional as a "direct regulation" of commerce. In *Arkansas Electric*, we considered whether to

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[9] It is worth noting that Congress has, at least on one occasion, followed a similar approach in its regulation of state taxation. In response to this Court's indication in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 452 (1959), that, so long as the taxpayer has an adequate nexus with the taxing State, "net income from the interstate operations of a foreign corporation may be subjected to state taxation," Congress enacted Pub. L. 86–272, codified at 15 U. S. C. § 381. That statute provides that a State may not impose a net income tax on any person if that person's "only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State." *Ibid.* As we noted in *Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U. S. 275, 280 (1972), in enacting § 381, "Congress attempted to allay the apprehension of businessmen that 'mere solicitation' would subject them to state taxation. . . . Section 381 was designed to define clearly a lower limit for the exercise of [the State's power to tax]. *Clarity that would remove uncertainty was Congress' primary goal.*" (Emphasis supplied.)

"follow the mechanical test set out in *Attleboro*, or the balance-of-interests test applied in our Commerce Clause cases." 461 U. S., at 390–391. We first observed that "the principle of *stare decisis* counsels us, here as elsewhere, not lightly to set aside specific guidance of the sort we find in *Attleboro*." *Id.*, at 391. In deciding to reject the *Attleboro* analysis, we were influenced by the fact that the "mechanical test" was "anachronistic," that the Court had rarely relied on the test, and that we could "see no strong reliance interests" that would be upset by the rejection of that test. 461 U. S., at 391–392. None of those factors obtains in this case. First, the *Attleboro* rule was "anachronistic" because it relied on formal distinctions between "direct" and "indirect" regulation (and on the regulatory counterparts of our *Freeman* line of cases); as discussed above, *Bellas Hess* turned on a different logic and thus remained sound after the Court repudiated an analogous distinction in *Complete Auto*. Second, unlike the *Attleboro* rule, we have, in our decisions, frequently relied on the *Bellas Hess* rule in the last 25 years, see *supra*, at 311, and we have never intimated in our review of sales or use taxes that *Bellas Hess* was unsound. Finally, again unlike the *Attleboro* rule, the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry. The "interest in stability and orderly development of the law" that undergirds the doctrine of *stare decisis*, see *Runyon* v. *McCrary*, 427 U. S. 160, 190–191 (1976) (STEVENS, J., concurring), therefore counsels adherence to settled precedent.

In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law. For

these reasons, we disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*.

This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve,[10] but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408 (1946). Indeed, in recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule.[11] Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.

Indeed, even if we were convinced that *Bellas Hess* was inconsistent with our Commerce Clause jurisprudence, "this very fact [might] giv[e us] pause and counse[l] withholding our hand, at least for now. Congress has the power to protect interstate commerce from intolerable or even undesirable burdens." *Commonwealth Edison Co.* v. *Montana*, 453 U. S., at 637 (WHITE, J., concurring). In this situation, it

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[10] Many States have enacted use taxes. See App. 3 to Brief for Direct Marketing Association as *Amicus Curiae*. An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses. The precise allocation of such burdens is better resolved by Congress rather than this Court.

[11] See, *e. g.*, H. R. 2230, 101st Cong., 1st Sess. (1989); S. 480, 101st Cong., 1st Sess. (1989); S. 2368, 100th Cong., 2d Sess. (1988); H. R. 3521, 100th Cong., 1st Sess. (1987); S. 1099, 100th Cong., 1st Sess. (1987); H. R. 3549, 99th Cong., 1st Sess. (1985); S. 983, 96th Cong., 1st Sess. (1979); S. 282, 93d Cong., 1st Sess. (1973).

may be that "the better part of both wisdom and valor is to respect the judgment of the other branches of the Government." *Id.*, at 638.

The judgment of the Supreme Court of North Dakota is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

National Bellas Hess, Inc. v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), held that the Due Process and Commerce Clauses of the Constitution prohibit a State from imposing the duty of use-tax collection and payment upon a seller whose only connection with the State is through common carrier or the United States mail. I agree with the Court that the Due Process Clause holding of *Bellas Hess* should be overruled. Even before *Bellas Hess*, we had held, correctly I think, that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail. See *Travelers Health Assn.* v. *Virginia ex rel. State Corp. Comm'n*, 339 U. S. 643, 646–650 (1950) (blue sky laws). It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax. As an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State, but we have rejected that. *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 558 (1977); *Scripto, Inc.* v. *Carson*, 362 U. S. 207, 211 (1960). I agree with the Court, moreover, that abandonment of *Bellas Hess'* due process holding is compelled by reasoning "[c]omparable" to that contained in our post-1967 cases dealing with state jurisdiction to adjudicate. *Ante*, at 308. I do not understand this to mean that the due process standards for

adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical; and on that basis I join Parts I, II, and III of the Court's opinion. Compare *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102 (1987), with *American Oil Co.* v. *Neill*, 380 U. S. 451 (1965).

I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*. *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 204 (1990) (SCALIA, J., concurring in judgment). Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has "special force" where "Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989). See also *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977). Moreover, the demands of the doctrine are "at their acme . . . where reliance interests are involved." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). As the Court notes, "the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizable industry." *Ante*, at 317.

I do not share JUSTICE WHITE's view that we may disregard these reliance interests because it has become unreasonable to rely upon *Bellas Hess*. *Post*, at 331–332. Even assuming for the sake of argument (I do not consider the point) that later decisions in related areas are inconsistent with the principles upon which *Bellas Hess* rested, we have never acknowledged that, but have instead carefully distinguished the case on its facts. See, *e. g.*, *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 33 (1988); *National Geographic Society*, *supra*, at 559. It seems to me important that we retain our ability—and, what comes to the same thing, that

we maintain public confidence in our ability—sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict. We seemed to be doing that in this area. Having affirmatively suggested that the "physical presence" rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word. We have recently told lower courts that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989). It is strangely incompatible with this to demand that private parties anticipate our overrulings. It is my view, in short, that reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance (though reliance alone may not always carry the day). Finally, the "physical presence" rule established in *Bellas Hess* is not "unworkable," *Patterson*, *supra*, at 173; to the contrary, whatever else may be the substantive pros and cons of the rule, the "bright-line" regime that it establishes, see *ante*, at 314, is unqualifiedly in its favor. JUSTICE WHITE's concern that reaffirmance of *Bellas Hess* will lead to a flurry of litigation over the meaning of "physical presence," see *post*, at 331, seems to me contradicted by 25 years of experience under the decision.

For these reasons, I concur in the judgment of the Court and join Parts I, II, and III of its opinion.

JUSTICE WHITE, concurring in part and dissenting in part.

Today the Court repudiates that aspect of our decision in *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U. S. 753 (1967), which restricts, under the Due Process Clause of the Fourteenth Amendment, the power of the States to impose use tax collection responsibilities on out-

of-state mail-order businesses that do not have a "physical presence" in the State. The Court stops short, however, of giving *Bellas Hess* the complete burial it justly deserves. In my view, the Court should also overrule that part of *Bellas Hess* which justifies its holding under the Commerce Clause. I, therefore, respectfully dissent from Part IV.

I

In Part IV of its opinion, the majority goes to some lengths to justify the *Bellas Hess* physical-presence requirement under our Commerce Clause jurisprudence. I am unpersuaded by its interpretation of our cases. In *Bellas Hess*, the majority placed great weight on the interstate quality of the mail-order sales, stating that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail-order transactions here involved." *Id.*, at 759. As the majority correctly observes, the idea of prohibiting States from taxing "exclusively interstate" transactions had been an important part of our jurisprudence for many decades, ranging intermittently from such cases as *Case of State Freight Tax*, 15 Wall. 232, 279 (1873), through *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946), and *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951). But though it recognizes that *Bellas Hess* was decided amidst an upheaval in our Commerce Clause jurisprudence, in which we began to hold that "a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause," *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 285 (1977), the majority draws entirely the wrong conclusion from this period of ferment.

The Court attempts to paint *Bellas Hess* in a different hue from *Freeman* and *Spector* because the former "did not rely" on labeling taxes that had "direct" and "indirect" effects on interstate commerce. See *ante*, at 310. Thus, the Court concludes, *Bellas Hess* "did not automatically fall with *Free-*

man and its progeny" in our decision in *Complete Auto*. See *ante*, at 311. I am unpersuaded by this attempt to distinguish *Bellas Hess* from *Freeman* and *Spector*, both of which were repudiated by this Court. See *Complete Auto*, *supra*, at 288–289, and n. 15. What we disavowed in *Complete Auto* was not just the "formal distinction between 'direct' and 'indirect' taxes on interstate commerce," *ante*, at 310, but also the whole notion underlying the *Bellas Hess* physical-presence rule—that "interstate commerce is immune from state taxation," *Complete Auto*, *supra*, at 288.

The Court compounds its misreading by attempting to show that *Bellas Hess* "is not inconsistent with *Complete Auto* and our recent cases." *Ante*, at 311. This will be news to commentators, who have rightly criticized *Bellas Hess*.[1] Indeed, the majority displays no small amount of audacity in claiming that our decision in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551, 559 (1977), which was rendered several weeks after *Complete Auto*, reaffirmed the continuing vitality of *Bellas Hess*. See *ante*, at 311.

Our decision in that case did just the opposite. *National Geographic* held that the National Geographic Society was liable for use tax collection responsibilities in California. The Society conducted an out-of-state mail-order business similar to the one at issue here and in *Bellas Hess*, and in addition, maintained two small offices in California that solicited advertisements for National Geographic Magazine. The Society argued that its physical presence in California was unrelated to its mail-order sales, and thus that the *Bel-*

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[1] See, *e. g.*, P. Hartman, Federal Limitations on State and Local Taxation § 10.8 (1981); Hartman, Collection of Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993, 1006–1015 (1986); Hellerstein, Significant Sales and Use Tax Developments During the Past Half Century, 39 Vand. L. Rev. 961, 984–985 (1986); McCray, Overturning *Bellas Hess:* Due Process Considerations, 1985 B. Y. U. L. Rev. 265, 288–290; Rothfeld, Mail Order Sales and State Jurisdiction to Tax, 53 Tax Notes 1405, 1414–1418 (1991).

las Hess rule compelled us to hold that the tax collection responsibilities could not be imposed. We expressly rejected that view, holding that the "requisite nexus for requiring an out-of-state seller [the Society] to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between (the State and) the *person* . . . it seeks to tax.'" 430 U. S., at 561 (citation omitted).

By decoupling any notion of a *transactional* nexus from the inquiry, the *National Geographic* Court in fact repudiated the free trade rationale of the *Bellas Hess* majority. Instead, the *National Geographic* Court relied on a due process-type minimum contacts analysis that examined whether a link existed between the seller and the State wholly apart from the seller's in-state transaction that was being taxed. Citations to *Bellas Hess* notwithstanding, see 430 U. S., at 559, it is clear that rather than adopting the rationale of *Bellas Hess*, the *National Geographic* Court was instead politely brushing it aside. Even were I to agree that the free trade rationale embodied in *Bellas Hess*' rule against taxes of purely interstate sales was required by our cases prior to 1967, therefore, I see no basis in the majority's opening premise that this substantive underpinning of *Bellas Hess* has not since been disavowed by our cases.[2]

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[2] Similarly, I am unconvinced by the majority's reliance on subsequent decisions that have cited *Bellas Hess*. See *ante*, at 311. In *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 33 (1988), for example, we distinguished *Bellas Hess* on the basis of the company's "significant economic presence in Louisiana, its many connections with the State, and the direct benefits it receives from Louisiana in conducting its business." We then went on to note that the situation presented was much more analogous to that in *National Geographic Society* v. *California Bd. of Equalization*, 430 U. S. 551 (1977). See 486 U. S., at 33–34. In *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 626 (1981), the Court cited *Bellas Hess* not to revalidate the physical-presence requirement, but rather to establish that a "nexus" must exist to justify imposition of a state tax. And finally, in

II

The Court next launches into an uncharted and treacherous foray into differentiating between the "nexus" requirements under the Due Process and Commerce Clauses. As the Court explains: "Despite the similarity in phrasing, the nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies." *Ante*, at 312. The due process nexus, which the Court properly holds is met in this case, see *ante*, at Part III, "concerns the fundamental fairness of governmental activity." *Ante*, at 312. The Commerce Clause nexus requirement, on the other hand, is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Ibid.*

Citing *Complete Auto*, the Court then explains that the Commerce Clause nexus requirement is not "like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." *Ante*, at 313. This is very curious, because parts two and three of the *Complete Auto* test, which require fair apportionment and nondiscrimination in order that interstate commerce not be unduly burdened, now appear to become the animating features of the nexus requirement, which is the first prong of the *Complete Auto* inquiry. The Court freely acknowledges that there is no authority for this novel interpretation of our cases and that we have never before found, as we do in this case, sufficient contacts for due process purposes but an insufficient nexus under the Commerce Clause. See *ante*, at 313–314, and n. 6.

The majority's attempt to disavow language in our opinions acknowledging the presence of due process require-

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Mobil Oil Corp. v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 437 (1980), the Court cited *Bellas Hess* for the due process requirements necessary to sustain a tax. In my view, these citations hardly signal the continuing support of *Bellas Hess* that the majority seems to find persuasive.

ments in the *Complete Auto* test is also unpersuasive. See *ante*, at 313–314, n. 7 (citing *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U. S. 358, 373 (1991)). Instead of explaining the doctrinal origins of the Commerce Clause nexus requirement, the majority breezily announces the rule and moves on to other matters. See *ante*, at 313–314. In my view, before resting on the assertion that the Constitution mandates inquiry into two readily distinct "nexus" requirements, it would seem prudent to discern the origins of the "nexus" requirement in order better to understand whether the Court's concern traditionally has been with the fairness of a State's tax or some other value.

The cases from which the *Complete Auto* Court derived the nexus requirement in its four-part test convince me that the issue of "nexus" is really a due process fairness inquiry. In explaining the sources of the four-part inquiry in *Complete Auto*, the Court relied heavily on Justice Rutledge's separate concurring opinion in *Freeman* v. *Hewit*, 329 U. S. 249 (1946), the case whose majority opinion the *Complete Auto* Court was in the process of comprehensively disavowing. Instead of the formalistic inquiry into whether the State was taxing interstate commerce, the *Complete Auto* Court adopted the more functionalist approach of Justice Rutledge in *Freeman*. See *Complete Auto*, 430 U. S., at 280–281. In conducting his inquiry, Justice Rutledge used language that by now should be familiar, arguing that a tax was unconstitutional if the activity lacked a sufficient connection to the State to give "jurisdiction to tax," *Freeman*, *supra*, at 271; or if the tax discriminated against interstate commerce; or if the activity was subjected to multiple tax burdens. 329 U. S., at 276–277. Justice Rutledge later refined these principles in *Memphis Natural Gas Co.* v. *Stone*, 335 U. S. 80 (1948), in which he described the principles that the *Complete Auto* Court would later substantially adopt: "[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar

as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory . . . ; [it] is duly apportioned . . . ; and cannot be repeated by any other state." 335 U. S., at 96–97 (concurring opinion) (footnotes omitted).

By the time the Court decided *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), Justice Rutledge was no longer on the Court, but his view of the nexus requirement as grounded in the Due Process Clause was decisively adopted. In rejecting challenges to a state tax based on the Due Process and Commerce Clauses, the Court stated: "The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.'" *Id.*, at 464 (citation omitted). The Court went on to observe that "[i]t strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements." *Id.*, at 464–465 (quoting *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954)). When the Court announced its four-part synthesis in *Complete Auto*, the nexus requirement was definitely traceable to concerns grounded in the Due Process Clause, and not the Commerce Clause, as the Court's discussion of the doctrinal antecedents for its rule made clear. See *Complete Auto*, *supra*, at 281–282, 285. For the Court now to assert that our Commerce Clause jurisprudence supports a separate notion of nexus is without precedent or explanation.

Even were there to be such an independent requirement under the Commerce Clause, there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it. Perhaps long ago a seller's "physical presence" was a sufficient part of a trade to condition imposition of a tax on

such presence. But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax. Wire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business. It is certainly true that the days of the door-to-door salesperson are not gone. Nevertheless, an out-of-state direct marketer derives numerous commercial benefits from the State in which it does business. These advantages include laws establishing sound local banking institutions to support credit transactions; courts to ensure collection of the purchase price from the seller's customers; means of waste disposal from garbage generated by mail-order solicitations; and creation and enforcement of consumer protection laws, which protect buyers and sellers alike, the former by ensuring that they will have a ready means of protecting against fraud, and the latter by creating a climate of consumer confidence that inures to the benefit of reputable dealers in mail-order transactions. To create, for the first time, a nexus requirement under the Commerce Clause independent of that established for due process purposes is one thing; to attempt to justify an anachronistic notion of physical presence in economic terms is quite another.

III

The illogic of retaining the physical-presence requirement in these circumstances is palpable. Under the majority's analysis, and our decision in *National Geographic*, an out-of-state seller with one salesperson in a State would be subject to use tax collection burdens on its entire mail-order sales even if those sales were unrelated to the salesperson's solicitation efforts. By contrast, an out-of-state seller in a neighboring State could be the dominant business in the putative taxing State, creating the greatest infrastructure burdens and undercutting the State's home companies by its compara-

tive price advantage in selling products free of use taxes, and yet not have to collect such taxes if it lacks a physical presence in the taxing State. The majority clings to the physical-presence rule not because of any logical relation to fairness or any economic rationale related to principles underlying the Commerce Clause, but simply out of the supposed convenience of having a bright-line rule. I am less impressed by the convenience of such adherence than the unfairness it produces. Here, convenience should give way. Cf. *Complete Auto*, *supra*, at 289, n. 15 ("We believe, however, that administrative convenience . . . is insufficient justification for abandoning the principle that 'interstate commerce may be made to pay its way'").

Also very questionable is the rationality of perpetuating a rule that creates an interstate tax shelter for one form of business—mail-order sellers—but no countervailing advantage for its competitors. If the Commerce Clause was intended to put businesses on an even playing field, the majority's rule is hardly a way to achieve that goal. Indeed, arguably even under the majority's explanation for its "Commerce Clause nexus" requirement, the unfairness of its rule on retailers other than direct marketers should be taken into account. See *ante*, at 312 (stating that the Commerce Clause nexus requirement addresses the "structural concerns about the effects of state regulation on the national economy"). I would think that protectionist rules favoring a $180-billion-a-year industry might come within the scope of such "structural concerns." See Brief for State of New Jersey as *Amicus Curiae* 4.

IV

The Court attempts to justify what it rightly acknowledges is an "artificial" rule in several ways. See *ante*, at 315. First, it asserts that the *Bellas Hess* principle "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes." *Ante*, at 315. It is very doubtful,

however, that the Court's opinion can achieve its aims. Certainly our cases now demonstrate two "bright-line" rules for mail-order sellers to follow: Under the physical-presence requirement reaffirmed here, they will not be subjected to use tax collection if they have no physical presence in the taxing State; under the *National Geographic* rule, mail-order sellers will be subject to use tax collection if they have some presence in the taxing State even if that activity has no relation to the transaction being taxed. See *National Geographic*, 430 U. S., at 560–562. Between these narrow lines lies the issue of what constitutes the requisite "physical presence" to justify imposition of use tax collection responsibilities.

Instead of confronting this question head on, the majority offers only a cursory analysis of whether Quill's physical presence in North Dakota was sufficient to justify its use tax collection burdens, despite briefing on this point by the State.[3] See Brief for Respondent 45–47. North Dakota contends that even should the Court reaffirm the *Bellas Hess* rule, Quill's physical presence in North Dakota was sufficient to justify application of its use tax collection law. Quill concedes it owns software sent to its North Dakota customers, but suggests that such property is insufficient to justify a finding of nexus. In my view, the question of Quill's actual physical presence is sufficiently close to cast doubt on the majority's confidence that it is propounding a truly "bright-line" rule. Reasonable minds surely can, and will, differ over what showing is required to make out a "physical pres-

[3] Instead of remanding for consideration of whether Quill's ownership of software constitutes sufficient physical presence under its new Commerce Clause nexus requirement, the majority concludes as a matter of law that it does not. See *ante*, at 315, n. 8. In so doing, the majority rebuffs North Dakota's challenge without setting out any clear standard for what meets the Commerce Clause physical-presence nexus standard and without affording the State an opportunity on remand to attempt to develop facts or otherwise to argue that Quill's presence is constitutionally sufficient.

ence" adequate to justify imposing responsibilities for use tax collection. And given the estimated loss in revenue to States of more than $3.2 billion this year alone, see Brief for Respondent 9, it is a sure bet that the vagaries of "physical presence" will be tested to their fullest in our courts.

The majority next explains that its "bright-line" rule encourages "settled expectations" and business investment. *Ante*, at 316. Though legal certainty promotes business confidence, the mail-order business has grown exponentially despite the long line of our post-*Bellas Hess* precedents that signaled the demise of the physical-presence requirement. Moreover, the Court's seeming but inadequate justification of encouraging settled expectations in fact connotes a substantive economic decision to favor out-of-state direct marketers to the detriment of other retailers. By justifying the *Bellas Hess* rule in terms of "the mail-order industry's dramatic growth over the last quarter century," *ante*, at 316, the Court is effectively imposing its own economic preferences in deciding this case. The Court's invitation to Congress to legislate in this area signals that its preferences are not immutable, but its approach is different from past instances in which we have deferred to state legislatures when they enacted tax obligations on the States' shares of interstate commerce. See, *e. g.*, *Goldberg* v. *Sweet*, 488 U. S. 252 (1989); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981).

Finally, the Court accords far greater weight to *stare decisis* than was given to that principle in *Complete Auto* itself. As that case demonstrates, we have not been averse to overruling our precedents under the Commerce Clause when they have become anachronistic in light of later decisions. See *Complete Auto*, 430 U. S., at 288–289. One typically invoked rationale for *stare decisis*—an unwillingness to upset settled expectations—is particularly weak in this case. It is unreasonable for companies such as Quill to invoke a "settled expectation" in conducting affairs without being taxed. Neither Quill nor any of its *amici* point to any investment deci-

sions or reliance interests that suggest any unfairness in overturning *Bellas Hess*. And the costs of compliance with the rule, in light of today's modern computer and software technology, appear to be nominal. See Brief for Respondent 40; Brief for State of New Jersey as *Amicus Curiae* 18. To the extent Quill developed any reliance on the old rule, I would submit that its reliance was unreasonable because of its failure to comply with the law as enacted by the North Dakota State Legislature. Instead of rewarding companies for ignoring the studied judgments of duly elected officials, we should insist that the appropriate way to challenge a tax as unconstitutional is to pay it (or in this case collect it and remit it or place it in escrow) and then sue for declaratory judgment and refund.[4] Quill's refusal to comply with a state tax statute prior to its being held unconstitutional hardly merits a determination that its reliance interests were reasonable.

The Court hints, but does not state directly, that a basis for its invocation of *stare decisis* is a fear that overturning *Bellas Hess* will lead to the imposition of retroactive liability. *Ante*, at 317, 318, n. 10. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991). As I thought in that case, such fears are groundless because no one can "sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system." *Id.*, at 546 (WHITE, J., concurring in judgment). Since we specifically limited the question on which certiorari was granted in order *not* to consider the potential retroactive effects of overruling *Bellas Hess*, I believe we should leave that issue for another day. If indeed fears about retroactivity are driving the Court's decision in this case, we would be better served, in my view, to address

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[4] For the federal rule, see *Flora* v. *United States*, 357 U. S. 63 (1958); see generally J. Mertens, Law of Federal Income Taxation § 58A.05 (1992). North Dakota appears to follow the same principle. See *First Bank of Buffalo* v. *Conrad*, 350 N. W. 2d 580, 586 (N. D. 1984) (citing 72 Am. Jur. 2d § 1087).

those concerns directly rather than permit them to infect our formulation of the applicable substantive rule.

Although Congress can and should address itself to this area of law, we should not adhere to a decision, however right it was at the time, that by reason of later cases and economic reality can no longer be rationally justified. The Commerce Clause aspect of *Bellas Hess*, along with its due process holding, should be overruled.

Syllabus

CHEMICAL WASTE MANAGEMENT, INC. *v.* HUNT, GOVERNOR OF ALABAMA, ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 91–471. Argued April 21, 1992—Decided June 1, 1992

Petitioner, Chemical Waste Management, Inc., operates a commercial hazardous waste land disposal facility in Emelle, Alabama, that receives both in-state and out-of-state wastes. An Alabama Act imposes, *inter alia*, a fee on hazardous wastes disposed of at in-state commercial facilities, and an additional fee on hazardous wastes generated outside, but disposed of inside, the State. Petitioner filed suit in state court, requesting declaratory relief against respondent state officials and seeking to enjoin the Act's enforcement. The trial court declared, among other things, that the additional fee violated the Commerce Clause, finding that the only basis for the fee is the waste's origin. The State Supreme Court reversed, holding that the fee advanced legitimate local purposes that could not be adequately served by reasonable nondiscriminatory alternatives.

Held:

1. Alabama's differential treatment of out-of-state waste violates the Commerce Clause. Pp. 339–349.

(a) No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate commerce. *Philadelphia* v. *New Jersey*, 437 U. S. 617; *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, *post*, p. 353. The State Act's additional fee facially discriminates against hazardous waste generated outside Alabama, and the Act has plainly discouraged the full operation of petitioner's facility. Such a burdensome tax imposed on interstate commerce alone is generally forbidden and is typically struck down without further inquiry. However, here the State argues that the additional fee serves legitimate local purposes. Pp. 339–343.

(b) Alabama has not met its burden of showing the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 353. Alabama's concern about the volume of waste entering the Emelle facility could be alleviated by less discriminatory means—such as applying an additional fee on all hazardous waste disposed of within Alabama, a per-mile tax on all vehicles transporting such waste across state roads, or an evenhanded cap on the total ton-

Syllabus

nage landfilled at Emelle—which would curtail volume from all sources. Additionally, any concern touching on environmental conservation and Alabama citizens' health and safety does not vary with the waste's point of origin, and the State has the power to monitor and regulate more closely the transportation and disposal of all hazardous waste within its borders. Even possible future financial and environmental risks to be borne by Alabama do not vary with the waste's State of origin in a way allowing foreign, but not local, waste to be burdened. Pp. 343–346.

(c) This Court's decisions regarding quarantine laws do not counsel a different conclusion. The additional fee may not legitimately be deemed a quarantine law because Alabama permits both the generation and landfilling of hazardous waste within its borders and the importation of additional hazardous waste. Moreover, the quarantine laws upheld by this Court "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *Philadelphia* v. *New Jersey*, *supra*, at 629. This Court's decision in *Maine* v. *Taylor*, 477 U. S. 131—upholding a state ban on the importation of baitfish after Maine showed that such fish were subject to parasites foreign to in-state baitfish and that there were no less discriminatory means of protecting its natural resources—likewise offers no respite to Alabama, since here the hazardous waste is the same regardless of its point of origin and adequate means other than overt discrimination meet Alabama's concerns. Pp. 346–348.

2. On remand the Alabama Supreme Court must consider the appropriate relief to petitioner. See, *e. g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulations*, 496 U. S. 18, 31. Pp. 348–349.

584 So. 2d 1367, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 349.

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller*, *Evan M. Tager*, *Fournier J. Gale III*, *H. Thomas Wells, Jr.*, *James T. Banks*, and *John T. Van Gessel*.

Bert S. Nettles argued the cause for respondents. With him on the brief were *William D. Little*, Assistant Attorney General of Alabama, *William D. Coleman*, *Jim B. Grant, Jr.*, *J. Wade Hope*, *Alton B. Parker, Jr.*, *J. Mark Hart*, and *Mark D. Hess*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Harriet S. Shapiro, Peter R. Steenland, Jr., Anne S. Almy, Louise F. Milkman,* and *Gerald H. Yamada.**

JUSTICE WHITE delivered the opinion of the Court.

Alabama imposes a hazardous waste disposal fee on hazardous wastes generated outside the State and disposed of at a commercial facility in Alabama. The fee does not apply to such waste having a source in Alabama. The Alabama

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*Briefs of *amici curiae* urging reversal were filed for American Trucking Associations, Inc., by *Daniel R. Barney, Robert Digges, Jr.,* and *Walter Hellerstein;* and for the Hazardous Waste Treatment Council et al. by *Stuart H. Newberger, Ridgway M. Hall, Jr., Clifton S. Elgarten, David Case,* and *Bruce Parker.*

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Robert Abrams,* Attorney General, *Jerry Boone,* Solicitor General, and *David A. Munro,* Assistant Attorney General; for the State of South Carolina et al. by *T. Travis Medlock,* Attorney General of South Carolina, *Edwin E. Evans,* Chief Deputy Attorney General, *James Patrick Hudson,* Deputy Attorney General, *Kenneth P. Woodington,* Senior Assistant Attorney General, *Treva G. Ashworth,* Senior Assistant Attorney General, *Walton J. McLeod III, Jacquelyn S. Dickman, Samuel L. Finklea III, Charles F. Lettow,* and *Matthew D. Slater, Robert T. Stephen,* Attorney General of Kansas, *Paul Van Dam,* Attorney General of Utah, and *Richard P. Ieyoub,* Attorney General of Louisiana; for the National Governors' Association et al. by *Richard Ruda* and *Michael G. Dzialo;* and for the State of Ohio et al. by *Lee Fisher,* Attorney General of Ohio, *Mary Kay Smith,* Assistant Attorney General, and *Nancy J. Miller, Chris Gorman,* Attorney General of Kentucky, and *Stan Cox,* Assistant Attorney General, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Richard P. Ieyoub,* Attorney General of Louisiana, *Frank J. Kelley,* Attorney General of Michigan, *Tom Udall,* Attorney General of New Mexico, *Mark W. Barnett,* Attorney General of South Dakota, *Paul Van Dam,* Attorney General of Utah, *Joseph B. Meyer,* Attorney General of Wyoming, and *Charles W. Burson,* Attorney General of Tennessee.

Supreme Court held that this differential treatment does not violate the Commerce Clause. We reverse.

I

Petitioner, Chemical Waste Management, Inc., a Delaware corporation with its principal place of business in Oak Brook, Illinois, owns and operates one of the Nation's oldest commercial hazardous waste land disposal facilities, located in Emelle, Alabama. Opened in 1977 and acquired by petitioner in 1978, the Emelle facility is a hazardous waste treatment, storage, and disposal facility operating pursuant to permits issued by the Environmental Protection Agency (EPA) under the Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2795, as amended, 42 U. S. C. § 6901 *et seq.*, and the Toxic Substances Control Act, 90 Stat. 2003, as amended, 15 U. S. C. § 2601 *et seq.* (1988 ed. and Supp. II), and by the State of Alabama under Ala. Code § 22–30–12(i) (1990). Alabama is 1 of only 16 States that have commercial hazardous waste landfills, and the Emelle facility is the largest of the 21 landfills of this kind located in these 16 States. Brief for National Governors' Assn. et al. as *Amici Curiae* 3, citing E. Smith, EI Digest 26–27 (Mar. 1992).

The parties do not dispute that the wastes and substances being landfilled at the Emelle facility "include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death."[1] 584

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[1] As used in RCRA, 42 U. S. C. § 6903(5), the term "hazardous waste" means:

"a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

"(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

So. 2d 1367, 1373 (Ala. 1991). Increasing amounts of out-of-state hazardous wastes are shipped to the Emelle facility for permanent storage each year. From 1985 through 1989, the tonnage of hazardous waste received per year has more than doubled, increasing from 341,000 tons in 1985 to 788,000 tons by 1989. Of this, up to 90% of the tonnage permanently buried each year is shipped in from other States.

Against this backdrop Alabama enacted Act No. 90–326 (Act). Ala. Code §§ 22–30B–1 to 22–30B–18 (1990 and Supp. 1991). Among other provisions, the Act includes a "cap" that generally limits the amount of hazardous wastes or substances[2] that may be disposed of in any 1-year period, and the amount of hazardous waste disposed of during the first year under the Act's new fees becomes the permanent ceiling in subsequent years. Ala. Code § 22–30B–2.3 (1990). The cap applies to commercial facilities that dispose of over 100,000 tons of hazardous wastes or substances per year, but only the Emelle facility, as the only commercial facility operating within Alabama, meets this description. The Act also imposes a "base fee" of $25.60 per ton on all hazardous wastes and substances disposed of at commercial facilities, to be paid by the operator of the facility. Ala. Code § 22–30B–2(a) (Supp. 1991). Finally, the Act imposes the "additional fee" at issue here, which states in full:

> "For waste and substances which are generated outside of Alabama and disposed of at a commercial site for

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"(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

RCRA directs the EPA to establish a comprehensive "cradle to grave" system regulating the generation, transport, storage, treatment, and disposal of hazardous wastes, §§ 6921–6939b, which includes identification and listing of hazardous wastes, § 6921. At present, there are more than 500 such listed wastes. See 40 CFR pt. 261, subpt. D (1991).

[2] "Hazardous substance(s)" and "hazardous waste(s)" are defined terms in the Act, §§ 22–30B–1(3) and 22–30B–1(4), but these definitions largely parallel the meanings given under federal law.

> the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton." § 22–30B–2(b).

Petitioner filed suit in state court requesting declaratory relief against respondents and seeking to enjoin enforcement of the Act. In addition to state-law claims, petitioner contended that the Act violated the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution, and was pre-empted by various federal statutes. The trial court declared the base fee and the cap provisions of the Act to be valid and constitutional; but, finding the only basis for the additional fee to be the origin of the waste, the trial court declared it to be in violation of the Commerce Clause. App. to Pet. for Cert. 83a–88a. Both sides appealed. The Alabama Supreme Court affirmed the rulings concerning the base fee and cap provisions but reversed the decision regarding the additional fee. The court held that the fee at issue advanced legitimate local purposes that could not be adequately served by reasonable nondiscriminatory alternatives and was therefore valid under the Commerce Clause. 584 So. 2d, at 1390.

Chemical Waste Management, Inc., petitioned for writ of certiorari, challenging all aspects of the Act. Because of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court, this Court's Rule 10.1(c), we granted certiorari limited to petitioner's Commerce Clause challenge to the additional fee. 502 U. S. 1070 (1992). We now reverse.

II

No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow

of interstate trade.[3] Today, in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources, post,* p. 353, we have also considered a Commerce Clause challenge to a Michigan law prohibiting private landfill operators from accepting solid waste originating outside the county in which their facilities operate. In striking down that law, we adhered to our decision in *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978), where we found New Jersey's prohibition of solid waste from outside that State to amount to economic protectionism barred by the Commerce Clause:

> "'[T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents'

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[3] The Alabama Supreme Court assumed that the disposal of hazardous waste constituted an article of commerce, and the State does not explicitly argue here to the contrary. In *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources, post,* at 359, we have reaffirmed the idea that "[s]olid waste, even if it has no value, is an article of commerce." As stated in *Philadelphia* v. *New Jersey,* 437 U. S. 617, 622–623 (1978): "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. . . . Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." The definition of "hazardous waste" makes clear that it is simply a grade of solid waste, albeit one of particularly noxious and dangerous propensities, see n. 1, *supra,* but whether the business arrangements between out-of-state generators of hazardous waste and the Alabama operator of a hazardous waste landfill are viewed as "sales" of hazardous waste or "purchases" of transportation and disposal services, "the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on [Alabama's] ability to regulate these transactions." *Fort Gratiot Sanitary Landfill, post,* at 359. See *National Solid Wastes Management Assn.* v. *Alabama Dept. of Environmental Mgmt.,* 910 F. 2d 713, 718–719 (CA11 1990), modified, 924 F. 2d 1001, cert. denied, 501 U. S. 1206 (1991).

pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.

"'The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. [511,] 522–524 [(1935)]; or to create jobs by keeping industry within the State, *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10 [(1928)]; *Johnson* v. *Haydel*, 278 U. S. 16 [(1928)]; *Toomer* v. *Witsell*, 334 U. S. [385,] 403–404 [(1948)]; or to preserve the State's financial resources from depletion by fencing out indigent immigrants, *Edwards* v. *California*, 314 U. S. 160, 173–174 [(1941)].'" *Fort Gratiot Sanitary Landfill, post*, at 360 (quoting *Philadelphia* v. *New Jersey, supra*, at 626–627).

To this list may be added cases striking down a tax discriminating against interstate commerce, even where such tax was designed to encourage the use of ethanol and thereby reduce harmful exhaust emissions, *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 279 (1988), or to support inspection of foreign cement to ensure structural integrity, *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 379–380 (1939). For in all of these cases, "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the

State from the national economy." *Philadelphia* v. *New Jersey, supra,* at 627.

The Act's additional fee facially discriminates against hazardous waste generated in States other than Alabama, and the Act overall has plainly discouraged the full operation of petitioner's Emelle facility.[4] Such burdensome taxes imposed on interstate commerce alone are generally forbidden: "[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty,* 467 U. S. 638, 642 (1984); see also *Walling* v. *Michigan,* 116 U. S. 446, 455 (1886); *Guy* v. *Baltimore,* 100 U. S. 434, 439 (1880). Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry. See, *e. g., Westinghouse Electric Corp.* v. *Tully,* 466 U. S. 388, 406–407 (1984); *Maryland* v. *Louisiana,* 451 U. S. 725, 759–760 (1981); *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318, 336–337 (1977).

The State, however, argues that the additional fee imposed on out-of-state hazardous waste serves legitimate local purposes related to its citizens' health and safety. Because the additional fee discriminates both on its face and in practical effect, the burden falls on the State "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333, 353 (1977); see also *Fort Gratiot Sanitary Landfill, post,* at 359; *New Energy Co., supra,* at 278–279. "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondis-

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[4] The Act went into effect July 15, 1990. The volume of hazardous waste buried at the Emelle facility fell dramatically from 791,000 tons in 1989 to 290,000 tons in 1991.

criminatory alternatives." *Hughes* v. *Oklahoma*, 441 U. S. 322, 337 (1979).[5]

The State's argument here does not significantly differ from the Alabama Supreme Court's conclusions on the legitimate local purposes of the additional fee imposed, which were:

> "The Additional Fee serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens." 584 So. 2d, at 1389.

These may all be legitimate local interests, and petitioner has not attacked them. But only rhetoric, and not explanation, emerges as to why Alabama targets *only* interstate hazardous waste to meet these goals. As found by the trial court, "[a]lthough the Legislature imposed an additional fee of $72.00 per ton on waste generated outside Alabama, there

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[5] To some extent the State attempts to avail itself of the more flexible approach outlined in, *e. g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 579 (1986), and *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970), but this lesser scrutiny is only available "where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade." *Philadelphia* v. *New Jersey*, 437 U. S., at 624 (emphasis added). We find no room here to say that the Act presents "effects upon interstate commerce that are only incidental," *ibid.*, for the Act's additional fee on its face targets *only* out-of-state hazardous waste. While no "clear line" separates close cases on which scrutiny should apply, "this is not a close case." *Wyoming* v. *Oklahoma*, 502 U. S. 437, 455, n. 12 (1992).

is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. The Court finds under the facts of this case that the only basis for the additional fee is the origin of the waste." App. to Pet. for Cert. 83a–84a. In the face of such findings, invalidity under the Commerce Clause necessarily follows, for "whatever [Alabama's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627; see *New Energy Co.*, 486 U. S., at 279–280. The burden is on the State to show that "the *discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism,"[6] *Wyoming* v. *Oklahoma*, 502 U. S. 437, 454 (1992) (emphasis added), and it has not carried this burden. Cf. *Fort Gratiot Sanitary Landfill*, *post*, at 361.

Ultimately, the State's concern focuses on the volume of the waste entering the Emelle facility.[7] Less discriminatory

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[6] The Alabama Supreme Court found no "economic protectionism" here, and thus purported to distinguish *Philadelphia* v. *New Jersey*, based on its conclusions that the legislature was motivated by public health and environmental concerns. 584 So. 2d 1367, 1388–1389 (1991). This narrow focus on the intended consequence of the additional fee does not conform to our precedents, for "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U. S. 333, 352–353 (1977), or discriminatory effect, see *Philadelphia* v. *New Jersey*, *supra*." *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 270 (1984). The "virtually *per se* rule of invalidity," *Philadelphia* v. *New Jersey*, *supra*, at 624, applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." *Maine* v. *Taylor*, 477 U. S. 131, 148, n. 19 (1986).

[7] "The risk created by hazardous waste and other similarly dangerous waste materials is proportional to the *volume* of such waste materials present, and may be controlled by controlling that volume." Brief for Respondents 38 (citation omitted; emphasis in original).

alternatives, however, are available to alleviate this concern, not the least of which are a generally applicable per-ton additional fee on *all* hazardous waste disposed of within Alabama, cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 619 (1981), or a per-mile tax on *all* vehicles transporting hazardous waste across Alabama roads, cf. *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 286 (1987), or an evenhanded cap on the total tonnage landfilled at Emelle, see *Philadelphia* v. *New Jersey*, *supra*, at 626, which would curtail volume from all sources.[8] To the extent Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste, and it remains within the State's power to monitor and regulate more closely the transporta-

[8] The State asserts: "An equal fee, at any level, would necessarily fail to serve the State's purpose. An equal fee high enough to provide any significant deterrent to the importation of hazardous waste for landfilling in the State would amount to an attempt by the State to avoid its responsibility to deal with its own problems, by tending to cause in-state waste to be exported for disposal. An equal fee not so high as to amount to an attempt to force Alabama's own problems to be borne by citizens of other states would fail to provide any significant reduction in the enormous volumes of imported hazardous waste being dumped in the State. At the point where an equal fee would become effective to serve the State's purpose in protecting public health and the environment from uncontrolled volumes of imported waste, that equal fee would also become an avoidance of the State's responsibility to deal with its own waste problems." *Id.*, at 46. These assertions are without record support and in any event do not suffice to validate plain discrimination against interstate commerce. See *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 280 (1988); *Hale* v. *Bimco Trading, Inc.*, 306 U. S. 375, 380 (1939): "That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundredweight is too violent an assumption to justify the discrimination here disclosed." The additional fee is certainly not a "'last ditch' attempt" to meet Alabama's expressed purposes "after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory [tax] even though nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Hughes* v. *Oklahoma*, 441 U. S. 322, 338 (1979).

tion and disposal of *all* hazardous waste within its borders. Even with the possible future financial and environmental risks to be borne by Alabama, such risks likewise do not vary with the waste's State of origin in a way allowing foreign, but not local, waste to be burdened.[9] In sum, we find the additional fee to be "an obvious effort to saddle those outside the State" with most of the burden of slowing the flow of waste into the Emelle facility. *Philadelphia* v. *New Jersey*, 437 U. S., at 629. "That legislative effort is clearly impermissible under the Commerce Clause of the Constitution." *Ibid.*

Our decisions regarding quarantine laws do not counsel a different conclusion.[10] The Act's additional fee may not legitimately be deemed a quarantine law because Alabama permits both the generation and landfilling of hazardous

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[9] The State presents no argument here, as it did below, that the additional fee makes out-of-state generators pay their "fair share" of the costs of Alabama waste disposal facilities, or that the additional fee is justified as a "compensatory tax." The trial court rejected these arguments, App. to Pet. for Cert. 88a, n. 6., finding the former foreclosed by *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 287–289 (1987), and the latter to be factually unsupported by a requisite "substantially equivalent" tax imposed solely on in-state waste, as required by, *e. g.*, *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 242–244 (1987). Various *amici* assert that the discrimination patent in the Act's additional fee is consistent with congressional authorization. We pretermit this issue, for it was not the basis for the decision below and has not been briefed or argued by the parties here.

[10] The State collects and refers to the following decisions, *inter alia*, as "quarantine cases": *Clason* v. *Indiana*, 306 U. S. 439 (1939); *Mintz* v. *Baldwin*, 289 U. S. 346 (1933); *Oregon-Washington Railroad & Navigation Co.* v. *Washington*, 270 U. S. 87 (1926); *Sligh* v. *Kirkwood*, 237 U. S. 52 (1915); *Asbell* v. *Kansas*, 209 U. S. 251 (1908); *Reid* v. *Colorado*, 187 U. S. 137 (1902); *Compagnie Francaise de Navigation a Vapeur* v. *Louisiana Bd. of Health*, 186 U. S. 380 (1902); *Smith* v. *St. Louis & Southwestern R. Co.*, 181 U. S. 248 (1901); *Rasmussen* v. *Idaho*, 181 U. S. 198 (1901); *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613 (1898); *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888); *Railroad Co.* v. *Husen*, 95 U. S. 465 (1878).

waste within its borders and the importation of still more hazardous waste subject to payment of the additional fee. In any event, while it is true that certain quarantine laws have not been considered forbidden protectionist measures, even though directed against out-of-state commerce, those laws "did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *Philadelphia* v. *New Jersey*, *supra*, at 629.[11] As the Court stated in *Guy* v. *Baltimore*, 100 U. S., at 443:

> "In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States."

See also *Reid* v. *Colorado*, 187 U. S. 137, 151 (1902); *Railroad Co.* v. *Husen*, 95 U. S. 465, 472 (1878).

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[11] "The hostility is to the thing itself, not to merely interstate shipments of the thing; and an undiscriminating hostility is at least nondiscriminatory. But that is not the case here. The State of Illinois is quite willing to allow the storage and even the shipment for storage of spent nuclear fuel in Illinois, provided only that its origin is intrastate." *Illinois* v. *General Elec. Co.*, 683 F. 2d 206, 214 (CA7 1982), cert. denied, 461 U. S. 913 (1983); cf. *Oregon-Washington Co.* v. *Washington*, *supra*, at 96: Inspection followed by quarantine of hay from fields infested with weevils is "a real quarantine law, and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the condition which might make its importation dangerous."

The law struck down in *Philadelphia* v. *New Jersey* left local waste untouched, although no basis existed by which to distinguish interstate waste. But "[i]f one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U. S., at 629. Here, the additional fee applies only to interstate hazardous waste, but at all points from its entrance into Alabama until it is landfilled at the Emelle facility, every concern related to quarantine applies perforce to local hazardous waste, which pays no additional fee. For this reason, the additional fee does not survive the appropriate scrutiny applicable to discriminations against interstate commerce.

Maine v. *Taylor*, 477 U. S. 131 (1986), provides no additional justification. Maine there demonstrated that the out-of-state baitfish were subject to parasites foreign to in-state baitfish. This difference posed a threat to the State's natural resources, and absent a less discriminatory means of protecting the environment—and none was available—the importation of baitfish could properly be banned. *Id.*, at 140. To the contrary, the record establishes that the hazardous waste at issue in this case is the same regardless of its point of origin. As noted in *Fort Gratiot Sanitary Landfill*, "our conclusion would be different if the imported waste raised health or other concerns not presented by [Alabama] waste." *Post*, at 367. Because no unique threat is posed, and because adequate means other than overt discrimination meet Alabama's concerns, *Maine* v. *Taylor* provides the State no respite.

III

The decision of the Alabama Supreme Court is reversed, and the cause is remanded for proceedings not inconsistent with this opinion, including consideration of the appropriate relief to petitioner. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regu-*

lations, 496 U. S. 18, 31 (1990); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 251–253 (1987).

So ordered.

CHIEF JUSTICE REHNQUIST, dissenting.

I have already had occasion to set out my view that States need not ban all waste disposal as a precondition to protecting themselves from hazardous or noxious materials brought across the State's borders. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 629 (1978) (REHNQUIST, J., dissenting). In a case also decided today, I express my further view that States may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators. See *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, *post*, p. 368 (REHNQUIST, C. J., dissenting). I dissent today, largely for the reasons I have set out in those two cases. Several additional comments that pertain specifically to this case, though, are in order.

Taxes are a recognized and effective means for discouraging the consumption of scarce commodities—in this case the safe environment that attends appropriate disposal of hazardous wastes. Cf. 26 U. S. C. §§ 4681, 4682 (1988 ed., Supp. III) (tax on ozone-depleting chemicals); 26 U. S. C. § 4064 (gas guzzler excise tax). I therefore see nothing unconstitutional in Alabama's use of a tax to discourage the export of this commodity to other States, when the commodity is a public good that Alabama has helped to produce. Cf. *Fort Gratiot*, *post*, at 372 (REHNQUIST, C. J., dissenting). Nor do I see any significance in the fact that Alabama has chosen to adopt a differential tax rather than an outright ban. Nothing in the Commerce Clause requires Alabama to adopt an "all or nothing" regulatory approach to noxious materials coming

from without the State. See *Mintz* v. *Baldwin*, 289 U. S. 346 (1933) (upholding State's *partial* ban on cattle importation).

In short, the Court continues to err by its failure to recognize that waste—in this case admittedly *hazardous* waste—presents risks to the public health and environment that a State may legitimately wish to avoid, and that the State may pursue such an objective by means less Draconian than an outright ban. Under force of this Court's precedent, though, it increasingly appears that the only avenue by which a State may avoid the importation of hazardous wastes is to ban such waste disposal altogether, regardless of the waste's source of origin. I see little logic in creating, and nothing in the Commerce Clause that requires us to create, such perverse regulatory incentives. The Court errs in substantial measure because it refuses to acknowledge that a safe and attractive environment is the commodity really at issue in cases such as this. See *Fort Gratiot*, *post*, at 369, n. (REHNQUIST, C. J., dissenting). The result is that the Court today gets it exactly backward when it suggests that Alabama is attempting to "isolate itself from a problem common to the several States." *Ante*, at 339. To the contrary, it is the 34 States that have no hazardous waste facility whatsoever, not to mention the remaining 15 States with facilities all smaller than Emelle, that have isolated themselves.

There is some solace to be taken in the Court's conclusion, *ante*, at 344–345, that Alabama may impose a substantial fee on the disposal of all hazardous waste, or a per-mile fee on all vehicles transporting such waste, or a cap on total disposals at the Emelle facility. None of these approaches provide Alabama the ability to tailor its regulations in a way that the State will be solving only that portion of the problem that it has created. See *Fort Gratiot*, *post*, at 370–371 (REHNQUIST, C. J., dissenting). But they do at least give Alabama some mechanisms for requiring waste-generating States to compensate Alabama for the risks the Court declares Alabama must run.

Of course, the costs of any of the proposals that the Court today approves will be less than fairly apportioned. For example, should Alabama adopt a flat transportation or disposal tax, Alabama citizens will be forced to pay a disposal tax equal to that faced by dumpers from outside the State. As the Court acknowledges, such taxes are a permissible effort to recoup compensation for the risks imposed on the State. Yet Alabama's general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure the Emelle facility's safe operation. Thus, Alabamians will be made to pay twice, once through general taxation and a second time through a specific disposal fee. Permitting differential taxation would, in part, do no more than recognize that, having been made to bear all the risks from such hazardous waste sites, Alabama should not in addition be made to pay *more* than others in supporting activities that will help to minimize the risk.

Other mechanisms also appear open to Alabama to achieve results similar to those that are seemingly foreclosed today. There seems to be nothing, for example, that would prevent Alabama from providing subsidies or other tax breaks to domestic industries that generate hazardous wastes. Or Alabama may, under the market participant doctrine, open its own facility catering only to Alabama customers. See, *e. g.*, *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U. S. 204, 206–208 (1983); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 436–437 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 810 (1976). But certainly we have lost our way when we require States to perform such gymnastics, when such performances will in turn produce little difference in ultimate effects. In sum, the only sure byproduct of today's decision is additional litigation. Assuming that those States that are currently the targets for large volumes of hazardous waste do not simply ban hazardous waste sites altogether, they will undoubtedly continue to search for a way to limit their risk from sites in operation. And each new arrange-

ment will generate a new legal challenge, one that will work to the principal advantage only of those States that refuse to contribute to a solution.

For the foregoing reasons, I respectfully dissent.

Syllabus

FORT GRATIOT SANITARY LANDFILL, INC. *v.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-636. Argued March 30, 1992—Decided June 1, 1992

The Waste Import Restrictions of Michigan's Solid Waste Management Act (SWMA) provide that solid waste generated in another county, State, or country cannot be accepted for disposal unless explicitly authorized in the receiving county's plan. After St. Clair County, whose plan does not include such authorization, denied petitioner company's 1989 application for authority to accept out-of-state waste at its landfill, petitioner filed this action seeking a judgment declaring the Waste Import Restrictions invalid under the Commerce Clause and enjoining their enforcement. The District Court dismissed the complaint, and the Court of Appeals affirmed. The latter court found no facial discrimination against interstate commerce because the statute does not treat out-of-county waste from Michigan any differently than waste from other States. The court also ruled that there was no actual discrimination because petitioner had not alleged that all Michigan counties ban out-of-state waste.

Held: The Waste Import Restrictions unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand Commerce Clause scrutiny. Pp. 358–368.

(a) *Philadelphia* v. *New Jersey*, 437 U. S. 617, 626–627, provides the proper analytical framework and controls here. Under the reasoning of that case, Michigan's Waste Import Restrictions clearly discriminate against interstate commerce, since they authorize each county to isolate itself from the national economy and, indeed, afford local waste producers complete protection from competition from out-of-state producers seeking to use local disposal areas unless a county acts affirmatively to authorize such use. Pp. 358–361.

(b) This case cannot be distinguished from *Philadelphia* v. *New Jersey* on the ground, asserted by respondents, that the Waste Import Restrictions treat waste from other Michigan counties no differently than waste from other States and thus do not discriminate against interstate commerce on their face or in effect. This Court's cases teach that a State (or one of its political subdivisions) may not avoid the Commerce

Clause's strictures by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself. See, *e. g., Brimmer* v. *Rebman*, 138 U. S. 78, 82–83. Nor does the fact that the Michigan statute allows individual counties to accept solid waste from out of state qualify its discriminatory character. Pp. 361–363.

(c) Also rejected is respondents' argument that this case is different from *Philadelphia* v. *New Jersey* because the SWMA constitutes a comprehensive health and safety regulation rather than "economic protectionism" of the State's limited landfill capacity. Even assuming that other provisions of the SWMA could fairly be so characterized, the same assumption cannot be made with respect to the Waste Import Restrictions themselves. Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives. Respondents have not met this burden, since they have provided no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount the operator may accept from inside the State. Pp. 363–368.

931 F. 2d 413, reversed.

STEVENS, J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 368.

Harold B. Finn III argued the cause for petitioner. With him on the briefs were *Donna Nelson Heller* and *David I. Albin.*

Thomas L. Casey, Assistant Solicitor General of Michigan, argued the cause for respondents. With him on the brief for the state respondents were *Frank J. Kelley*, Attorney General, *Gay Secor Hardy*, Solicitor General, and *Thomas J. Emery* and *James E. Riley*, Assistant Attorneys General. *Lawrence R. Ternan, Margaret Battle Kiernan*, and *Robert J. Nickerson* filed a brief for the county respondents.*

**Andrew J. Pincus, Evan M. Tager*, and *Bruce J. Parker* filed a brief for the National Solid Wastes Management Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Chris Gorman*, Attorney General of Kentucky, and

JUSTICE STEVENS delivered the opinion of the Court.

In *Philadelphia* v. *New Jersey*, 437 U. S. 617, 618 (1978), we held that a New Jersey law prohibiting the importation of most "'solid or liquid waste which originated or was collected outside the territorial limits of the State'" violated the Commerce Clause of the United States Constitution. In this case petitioner challenges a Michigan law that prohibits private landfill operators from accepting solid waste that originates outside the county in which their facilities are located. Adhering to our holding in the *New Jersey* case, we conclude that this Michigan statute is also unconstitutional.

I

In 1978, Michigan enacted its Solid Waste Management Act[1] (SWMA). That Act required every Michigan county to estimate the amount of solid waste that would be generated in the county in the next 20 years and to adopt a plan providing for its disposal at facilities that comply with state health standards. Mich. Comp. Laws § 299.425 (Supp. 1991).

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[1] 1978 Mich. Pub. Acts, No. 641, codified as amended, Mich. Comp. Laws §§ 299.401–299.437 (1984 ed. and Supp. 1991).

After holding public hearings and obtaining the necessary approval of municipalities in the county, as well as the approval of the Director of the Michigan Department of Natural Resources, the County Board of Commissioners adopted a solid waste management plan for St. Clair County. In 1987, the Michigan Department of Natural Resources issued a permit to petitioner to operate a sanitary landfill as a solid waste[2] disposal area in St. Clair County. See *Bill Kettlewell Excavating, Inc.* v. *Michigan Dept. of Natural Resources*, 931 F. 2d 413, 414 (CA6 1991).

On December 28, 1988, the Michigan Legislature amended the SWMA by adopting two provisions concerning the "acceptance of waste or ash generated outside the county of disposal area." See 1988 Mich. Pub. Acts, No. 475, § 1, codified as amended, Mich. Comp. Laws §§ 299.413a, 299.430(2)

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[2] The Michigan statute defines solid waste as follows:

"Sec. 7. (1) 'Solid waste' means garbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste other than organic waste generated in the production of livestock and poultry. Solid waste does not include the following:

"(a) Human body waste.

"(b) Organic waste generated in the production of livestock and poultry.

"(c) Liquid waste.

"(d) Ferrous or nonferrous scrap directed to a scrap metal processor or to a reuser of ferrous or nonferrous products.

"(e) Slag or slag products directed to a slag processor or to a reuser of slag or slag products.

"(f) Sludges and ashes managed as recycled or nondetrimental materials appropriate for agricultural or silvicultural use pursuant to a plan approved by the director.

"(g) Materials approved for emergency disposal by the director.

"(h) Source separated materials.

"(i) Site separated materials.

"(j) Fly ash or any other ash produced from the combustion of coal, when used in the following instances . . .

"(k) Other wastes regulated by statute." Mich. Comp. Laws § 299.407(7) (Supp. 1991).

(Supp. 1991). Those amendments (Waste Import Restrictions), which became effective immediately, provide:

> "A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." § 299.413a.
>
> "In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county." § 299.430(2).

In February 1989, petitioner submitted an application to the St. Clair County Solid Waste Planning Committee for authority to accept up to 1,750 tons per day of out-of-state waste at its landfill. See *Bill Kettlewell Excavating, Inc.* v. *Michigan Dept. of Natural Resources*, 732 F. Supp. 761, 762 (ED Mich. 1990). In that application petitioner promised to reserve sufficient capacity to dispose of all solid waste generated in the county in the next 20 years. The planning committee denied the application. *Ibid.* In view of the fact that the county's management plan does not authorize the acceptance of any out-of-county waste, the Waste Import Restrictions in the 1988 statute effectively prevent petitioner from receiving any solid waste that does not originate in St. Clair County.

Petitioner therefore commenced this action seeking a judgment declaring the Waste Import Restrictions unconstitutional and enjoining their enforcement. Petitioner contended that requiring a private landfill operator to limit its business to the acceptance of local waste constituted impermissible discrimination against interstate commerce. The District Court denied petitioner's motion for summary judgment, however, *id.*, at 766, and subsequently dismissed the complaint, App. 4. The court first concluded that the statute

does not discriminate against interstate commerce "on its face" because the import restrictions apply "equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities." 732 F. Supp., at 764. It also concluded that there was no discrimination "in practical effect" because each county was given discretion to accept out-of-state waste. *Ibid.* Moreover, the incidental effect on interstate commerce was "not clearly excessive in relation to the [public health and environmental] benefits derived by Michigan from the statute." *Id.*, at 765.

The Court of Appeals for the Sixth Circuit agreed with the District Court's analysis. Although it recognized that the statute "places in-county and out-of-county waste in separate categories," the Court of Appeals found no discrimination against interstate commerce because the statute "does not treat out-of-county waste from Michigan any differently than waste from other states." 931 F. 2d, at 417. It also agreed that there was no actual discrimination because petitioner had not alleged that all counties in Michigan ban out-of-state waste. *Id.*, at 418. Accordingly, it affirmed the judgment of the District Court. *Ibid.* We granted certiorari, 502 U. S. 1024 (1992), because of concern that the decision below was inconsistent with *Philadelphia* v. *New Jersey* and now reverse.

II

Before discussing the rather narrow issue that is contested, it is appropriate to identify certain matters that are not in dispute. Michigan's comprehensive program of regulating the collection, transportation, and disposal of solid waste, as it was enacted in 1978 and administered prior to the 1988 Waste Import Restrictions, is not challenged. No issue relating to hazardous waste is presented, and there is no claim that petitioner's operation violated any health, safety, or sanitation requirement. Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of

publicly owned facilities. The case involves only the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills.

On the other hand, *Philadelphia* v. *New Jersey* provides the framework for our analysis of this case. Solid waste, even if it has no value, is an article of commerce.[3] 437 U. S., at 622–623. Whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as "sales" of garbage or "purchases" of transportation and disposal services, the commercial transactions unquestionably have an interstate character. The Commerce Clause thus imposes some constraints on Michigan's ability to regulate these transactions.

As we have long recognized, the "negative" or "dormant" aspect of the Commerce Clause prohibits States from "advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 535 (1949). A state statute that clearly discriminates against interstate commerce is therefore unconstitutional "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 274 (1988).

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[3] As we explained in *Philadelphia* v. *New Jersey*:

"All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. In *Bowman* [v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888),] and similar cases, the Court held simply that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines. Hence, we reject the state court's suggestion that the banning of 'valueless' out-of-state wastes by ch. 363 implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement. Cf. *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 802–814; *Meat Drivers* v. *United States*, 371 U. S. 94." 437 U. S., at 622–623.

New Jersey's prohibition on the importation of solid waste failed this test:

> "[T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of ch. 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.
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> "The Court has consistently found parochial legislation of this kind to be constitutionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S., at 522–524; or to create jobs by keeping industry within the State, *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 10; *Johnson* v. *Haydel*, 278 U. S. 16; *Toomer* v. *Witsell*, 334 U. S., at 403–404; or to preserve the State's financial resources from depletion by fencing out indigent immigrants, *Edwards* v. *California*, 314 U. S. 160, 173–174. In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." *Philadelphia* v. *New Jersey*, 437 U. S., at 626–627.

The Waste Import Restrictions enacted by Michigan authorize each of the State's 83 counties to isolate itself from the national economy. Indeed, unless a county acts affirmatively to permit other waste to enter its jurisdiction, the statute affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas. In view of the fact that Michigan has not identified any reason, apart from its origin, why solid waste coming from outside the county should be treated differently from solid waste within the county, the foregoing reasoning would appear to control the disposition of this case.

III

Respondents Michigan and St. Clair County argue, however, that the Waste Import Restrictions—unlike the New Jersey prohibition on the importation of solid waste—do not discriminate against interstate commerce on their face or in effect because they treat waste from other Michigan counties no differently than waste from other States. Instead, respondents maintain, the statute regulates evenhandedly to effectuate local interests and should be upheld because the burden on interstate commerce is not clearly excessive in relation to the local benefits. Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). We disagree, for our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.

In *Brimmer* v. *Rebman*, 138 U. S. 78 (1891), we reviewed the constitutionality of a Virginia statute that imposed special inspection fees on meat from animals that had been slaughtered more than 100 miles from the place of sale. We concluded that the statute violated the Commerce Clause even though it burdened Virginia producers as well as the Illinois litigant before the Court. We explained:

> "[T]his statute [cannot] be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota* v. *Barber*, [136 U. S. 313 (1890)]; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced." *Id.*, at 82–83.

In *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), another Illinois litigant challenged a city ordinance that made it unlawful to sell any milk as pasteurized unless it had been processed at a plant "within a radius of five miles from the central square of Madison," *id.*, at 350. We held the ordinance invalid, explaining:

> "[T]his regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc.*, [294 U. S. 511 (1935)], in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. 'The importer . . . may keep his milk or drink it, but sell it he may not.' *Id.*, at 521. In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.*, at 354.

The fact that the ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate its burden on interstate commerce. As we noted, it was "immaterial that Wisconsin milk from outside the Madison area is sub-

jected to the same proscription as that moving in interstate commerce." *Id.*, at 354, n. 4.

Nor does the fact that the Michigan statute allows individual counties to accept solid waste from out of state qualify its discriminatory character. In the *New Jersey* case the statute authorized a state agency to promulgate regulations permitting certain categories of waste to enter the State. See 437 U. S., at 618–619. The limited exception covered by those regulations—like the fact that several Michigan counties accept out-of-state waste—merely reduced the scope of the discrimination; for all categories of waste not excepted by the regulations, the discriminatory ban remained in place. Similarly, in this case St. Clair County's total ban on out-of-state waste is unaffected by the fact that some other counties have adopted a different policy.[4]

In short, neither the fact that the Michigan statute purports to regulate intercounty commerce in waste nor the fact that some Michigan counties accept out-of-state waste provides an adequate basis for distinguishing this case from *Philadelphia* v. *New Jersey*.

IV

Michigan and St. Clair County also argue that this case is different from *Philadelphia* v. *New Jersey* because the SWMA constitutes a comprehensive health and safety regulation rather than "economic protectionism" of the State's limited landfill capacity. Relying on an excerpt from our opinion in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S.

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[4] Cf. *Wyoming* v. *Oklahoma*, 502 U. S. 437, 455 (1992) (Oklahoma statute that "expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of . . . other States," violates the Commerce Clause even though it "sets aside only a 'small portion' of the Oklahoma coal market . . . . The volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce") (emphasis in original).

941 (1982), they contend that the differential treatment of out-of-state waste is reasonable because they have taken measures to conserve their landfill capacity and the SWMA is necessary to protect the health of their citizens. That reliance is misplaced. In the *Sporhase* case we considered the constitutionality of a Nebraska statute that prohibited the withdrawal of ground water for use in an adjoining State without a permit that could only issue if four conditions were satisfied.[5] We held that the fourth condition—a requirement that the adjoining State grant reciprocal rights to withdraw its water and allow its use in Nebraska—violated the Commerce Clause. *Id.*, at 957–958.

As a preface to that holding, we identified several reasons that, in combination, justified the conclusion that the other conditions were facially valid. *Id.*, at 957. First, we questioned whether the statute actually discriminated against interstate commerce. Although the restrictive conditions in the statute nominally applied only to interstate transfers of ground water, they might have been "no more strict in application than [other state-law] limitations upon intrastate transfers." *Id.*, at 956. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it

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[5] The statute at issue in *Sporhase* v. *Nebraska ex rel. Douglas* provided: "'Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.'" 458 U. S., at 944 (quoting Neb. Rev. Stat. § 46–613.01 (1978)).

seeks to prevent the uncontrolled transfer of water out of the State." *Id.*, at 955–956.

We further explained that a confluence of factors could justify a State's efforts to conserve and preserve ground water for its own citizens in times of severe shortage.[6] Only the first of those reasons—our reference to the well-recognized

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[6] "Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the 'confluence of [several] realities.' *Hicklin* v. *Orbeck*, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin* v. *Orbeck*, *supra*, at 533–534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 950–951. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); cf. *Philadelphia* v. *New Jersey*, 437 U. S., at 627–628, and n. 6; *Baldwin* v. *Fish and Game Comm'n of Montana*, 436 U. S. 371 (1978). A facial examination of the first three conditions set forth in § 46–613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness." *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S., at 956–957.

difference between economic protectionism, on the one hand, and health and safety regulation, on the other—is even arguably relevant to this case.[7] We may assume that all of the provisions of Michigan's SWMA prior to the 1988 amendments adding the Waste Import Restrictions could fairly be characterized as health and safety regulations with no protectionist purpose, but we cannot make that same assumption with respect to the Waste Import Restrictions themselves. Because those provisions unambiguously discriminate against interstate commerce, the State bears the burden of proving that they further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives. Michigan and St. Clair County have not met this burden.[8]

Michigan and St. Clair County assert that the Waste Import Restrictions are necessary because they enable individual counties to make adequate plans for the safe disposal of future waste.[9] Although accurate forecasts about the vol-

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[7] The other reasons were related to the special role that States have traditionally played in the ownership and control of ground water and to the fact that Nebraska's conservation efforts had given the water some indicia of a good that is publicly produced and owned. See *id.*, at 956. There are, however, no analogous traditional legal expectations regarding state regulation of private landfills, which are neither publicly produced nor publicly owned.

[8] The dissent states that we should remand for further proceedings in which Michigan and St. Clair County might be able to prove that the Waste Import Restrictions constitute legitimate health and safety regulations, rather than economic protectionism of the State's limited landfill capacity. See *post*, at 368, 371. We disagree, for respondents have neither asked for such a remand nor suggested that, if given the opportunity, they could prove that the restrictions further health and safety concerns that cannot adequately be served by nondiscriminatory alternatives.

[9] "An unregulated free market flow of waste into Michigan," the State asserts, "would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process." Brief for State Respondents 49; see also Brief for County Respondents 13.

ume and composition of future waste flows may be an indispensable part of a comprehensive waste disposal plan, Michigan could attain that objective without discriminating between in- and out-of-state waste. Michigan could, for example, limit the amount of waste that landfill operators may accept each year. See *Philadelphia* v. *New Jersey*, 437 U. S., at 626. There is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State.

Of course, our conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste. In *Maine* v. *Taylor*, 477 U. S. 131 (1986), for example, we upheld the State's prohibition against the importation of live baitfish because parasites and other characteristics of nonnative species posed a serious threat to native fish that could not be avoided by available inspection techniques. We concluded:

> "The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently,' *Philadelphia* v. *New Jersey*, 437 U. S., at 627." *Id.*, at 151–152.

In this case, in contrast, the lower courts did not find—and respondents have not provided—any legitimate reason for allowing petitioner to accept waste from inside the county but not waste from outside the county.

For the foregoing reasons, the Waste Import Restrictions unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce

Clause. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

When confronted with a dormant Commerce Clause challenge "[t]he crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). Because I think the Michigan statute is at least arguably directed to legitimate local concerns, rather than improper economic protectionism, I would remand this case for further proceedings.

The substantial environmental, esthetic, health, and safety problems flowing from this country's waste piles were already apparent at the time we decided *Philadelphia*. Those problems have only risen in the intervening years. Salisbury, Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia, 21 Envtl. L. 357, 369–370 (1991). In part this is due to increased waste volumes, volumes that are expected to continue rising for the foreseeable future. See United States Environmental Protection Agency, Characterization of Municipal Solid Waste in the United States: 1990 Update 10 (municipal solid wastes have increased from 128.1 million tons in 1975 to 179.6 million tons in 1988, expected to rise to 216 million tons by the year 2000); *id.*, at ES–3 (1988 waste was the equivalent of 4.0 pounds per person per day, expected to rise to 4.4 pounds per person by the year 2000). In part it is due to exhaustion of existing capacity. *Id.*, at 55 (landfill disposals increased from 99.7 million tons in 1975 to 130.5 million in 1988); 56 Fed. Reg. 50980 (1991) (45% of solid waste landfills expected to reach

capacity by 1991). It is no secret why capacity is not expanding sufficiently to meet demand—the substantial risks attendant to waste sites make them extraordinarily unattractive neighbors. *Swin Resource Systems, Inc.* v. *Lycoming Cty.*, 883 F. 2d 245, 253 (CA3 1989), cert. denied, 493 U. S. 1077 (1990). The result, of course, is that while many are willing to generate waste—indeed, it is a practical impossibility to solve the waste problem by banning waste production—few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste.*

The State of Michigan has stepped into this quagmire in order to address waste problems generated by its own populace. It has done so by adopting a comprehensive approach to the disposal of solid wastes generated within its borders. The legislation challenged today is simply one part of a broad package that includes a number of features: a state-mandated statewide effort to control and plan for waste disposal, Mich. Comp. Laws §§ 299.427 and 299.430 (1984 and Supp. 1991), requirements that local units of government participate in the planning process, *ibid.*, and § 299.426 (Supp. 1991), restrictions to assure safe transport, § 299.431 (1984), a ban on the operation of waste disposal facilities unless various design and technical requirements are satisfied and appropriate permits obtained, *ibid.*, and § 299.432a (Supp. 1991), and commitments to promote source separation, composting, and recycling, § 299.430a (Supp. 1991). The Michigan legislation is

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*I am baffled by the Court's suggestion that this case might be characterized as one in which garbage is being bought and sold. See *ante*, at 359. There is no suggestion that petitioner is making payment in order to have garbage delivered to it. Petitioner is, instead, being paid to accept the garbage of which others wish to be rid. There can be little doubt that in accepting this garbage, petitioner is also imposing environmental and other risks attendant to the waste's delivery and storage.

thus quite unlike the simple outright ban that we confronted in *Philadelphia.*

In adopting this legislation, the Michigan Legislature also appears to have concluded that, like the State, counties should reap as they have sown—hardly a novel proposition. It has required counties within the State to be responsible for the waste created within the county. It has accomplished this by prohibiting waste facilities from accepting waste generated from outside the county, unless special permits are obtained. In the process, of course, this facially neutral restriction (*i. e.*, it applies equally to both interstate and intrastate waste) also works to ban disposal from out-of-state sources unless appropriate permits are procured. But I cannot agree that such a requirement, when imposed as one part of a comprehensive approach to regulating in this difficult field, is the stuff of which economic protectionism is made.

If anything, the challenged regulation seems likely to work to Michigan's economic disadvantage. This is because, by limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit for Michigan consumers. 56 Fed. Reg. 50987 (1991). The regulation also will require some Michigan counties—those that until now have been exporting their waste to other locations in the State—to confront environmental and other risks that they previously have avoided. Commerce Clause concerns are at their nadir when a state Act works in this fashion—raising prices for all the State's consumers, and working to the substantial disadvantage of other segments of the State's population—because in these circumstances "'a State's own political processes will serve as a check against unduly burdensome regulations.'" *Kassel* v. *Consolidated Freightways Corp. of Del.*, 450 U. S. 662, 675 (1981) (quoting *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U. S. 429, 444, n. 18 (1978)). In sum, the law simply incorporates the com-

monsense notion that those responsible for a problem should be responsible for its solution *to the degree they are responsible for the problem but not further.* At a minimum, I think the facts just outlined suggest the State must be allowed to present evidence on the economic, environmental, and other effects of its legislation.

The Court suggests that our decisions in *Brimmer* v. *Rebman*, 138 U. S. 78 (1891), and *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), foreclose the possibility that a statute attacked on Commerce Clause grounds may be defended by pointing to the statute's effects on intrastate commerce. But our decisions in those cases did not rest on such a broad proposition. Instead, as the passages quoted by the Court make clear, in both *Brimmer* and *Dean Milk* the Court simply rejected the notion that there could be a noneconomic protectionist reason for the bans at issue, because the objects being banned presented no health or environmental risk. See *Brimmer*, 138 U. S., at 83 ("[i]f the object of Virginia had been to obstruct the bringing into that State, for uses as human food, of all beef, veal and mutton, *however wholesome*" (emphasis added)); see also *ibid.* (comparing the statute to one that bans meat from other States "in whatever form, and although *entirely sound and fit* for human food" (emphasis added)); *Dean Milk*, 340 U. S., at 354 (the statute "excludes from distribution in Madison *wholesome* milk" (emphasis added)). It seems unlikely that the waste here is "wholesome" or "entirely sound and fit." It appears, instead, to be potentially dangerous—at least the State has so concluded. Nor does the legislation appear to protect "a major local industry against competition from without the State." *Ibid.* Neither *Dean Milk* nor *Brimmer* prohibits a State from adopting health and safety regulations that are directed to legitimate local concerns. See *Maine* v. *Taylor*, 477 U. S. 131 (1986). I would remand this case to give the State an opportunity to show that this is such a regulation.

We confirmed in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941 (1982), that a State's effort to adopt a comprehensive regime to address a major environmental threat or threat to natural resources need not run afoul of the Commerce Clause. In that case we noted that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Id.*, at 955–956. Substitute "attractive and safe environment" for "water" and one has the present case. Michigan has limited the ability of its own population to despoil the environment and to create health and safety risks by excessive and uncontrolled waste disposal. It does not thereby violate the Commerce Clause when it seeks to prevent this resource from being exported—the effect if Michigan is forced to accept foreign waste in its disposal facilities. Rather, the "resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Id.*, at 957. Of course the State may choose not to do this, and in fact, in this case Michigan does permit counties to decide on an individualized basis whether to accept out-of-county waste. But such a result is not constitutionally mandated.

The modern landfill is a technically complex engineering exercise that comes replete with liners, leachate collection systems, and highly regulated operating conditions. As a result, siting a modern landfill can now proceed largely independent of the landfill location's particular geological characteristics. See 56 Fed. Reg. 51009 (1991) (Environmental Protection Agency approved "composite liner system is designed to be protective in all locations, including poor locations"); *id.*, at 51004–51005 (outlining additional technical requirements for only those landfill sites (1) near airports, (2) on floodplains, (3) on wetlands, (4) on fault areas, (5) on seismic impact zones, or (6) on unstable areas). Given this, the laws of economics suggest that landfills will sprout in places

where land is cheapest and population densities least. See Alm, "Not in My Backyard:" Facing the Siting Question, 10 EPA J. 9 (1984) (noting the need for each county to accept a share of the overall waste stream equivalent to what it generates so that "less populated counties are protected against becoming the dumping ground of the entire region"). I see no reason in the Commerce Clause, however, that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present.

The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack. The Court's approach fails to recognize that the latter option is one that is quite real and quite attractive for many States—and becomes even more so when the intermediate option of solving its own problems, but only its own problems, is eliminated.

For the foregoing reasons, I respectfully dissent.

Syllabus

MORALES, ATTORNEY GENERAL OF TEXAS *v.* TRANS WORLD AIRLINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–1604. Argued March 3, 1992—Decided June 1, 1992

In order to ensure that the States would not undo the anticipated benefits of federal deregulation of the airline industry, the pre-emption provision of the Airline Deregulation Act of 1978 (ADA) prohibits them from enforcing any law "relating to [air carriers'] rates, routes, or services." 49 U. S. C. App. § 1305(a)(1). After the National Association of Attorneys General (NAAG) adopted guidelines that contain detailed standards governing, *inter alia*, the content and format of airline fare advertising, and that purport to be enforceable through the States' general consumer protection statutes, petitioner's predecessor as Attorney General of Texas sent notices of intent to sue to enforce the guidelines against the allegedly deceptive fare advertisements of several of the respondent airlines. Those respondents filed suit in the District Court for injunctive and other relief, claiming that state regulation of fare advertisements is pre-empted by § 1305(a)(1). The court ultimately issued an order permanently enjoining any state enforcement action that would regulate or restrict "any aspect" of respondents' fare advertising or other operations involving rates, routes, or services. The Court of Appeals affirmed.

Held:

1. Assuming that § 1305(a)(1) pre-empts state enforcement of the fare advertising portions of the NAAG guidelines, the District Court could properly award respondents injunctive relief restraining such enforcement. The basic doctrine that equity courts should not act when the moving party has an adequate remedy at law does not prevent federal courts from enjoining state officers from acting to enforce an unconstitutional state law where, as here, such action is imminent, repetitive penalties attach to continuing or repeated violations of the law, and the moving party lacks the realistic option of violating the law once and raising its federal defenses. *Ex parte Young*, 209 U. S. 123, 145–147, 156, 163–165. As petitioner has threatened to enforce only the obligations described in the fare advertising portions of the guidelines, however, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters. See, *e. g.*, *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 240–241. Pp. 380–383.

Syllabus

2. Enforcement of the NAAG fare advertising guidelines through a State's general consumer protection laws is pre-empted by the ADA. Pp. 383–391.

(a) In light of the breadth of § 1305(a)(1)'s "relating to" phrase, a state enforcement action is pre-empted if it has a connection with, or reference to, airline "rates, routes, or services." Cf. *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95–96. Petitioner's various objections to this reading are strained and not well taken. Pp. 383–387.

(b) The challenged NAAG guidelines—which require, *inter alia*, that advertisements contain certain disclosures as to fare terms, restrictions, and availability—obviously "relat[e] to rates" within the meaning of § 1305(a)(1) and are therefore pre-empted. Each guideline bears an express reference to airfares, and, collectively, they establish binding requirements as to how tickets may be marketed if they are to be sold at given prices. In any event, beyond the guidelines' express reference to fares, it is clear as an economic matter that they would have the forbidden effect upon fares: Their compelled disclosures and advertising restrictions would have a significant impact on the airlines' ability to market their product, and hence a significant impact upon the fares they charge. Pp. 387–391.

949 F. 2d 141, affirmed in part and reversed in part.

SCALIA, J., delivered the opinion of the Court, in which WHITE, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and BLACKMUN, J., joined, *post*, p. 419. SOUTER, J., took no part in the consideration or decision of the case.

Stephen Gardner, Assistant Attorney General of Texas, argued the cause for petitioner. With him on the briefs were *Dan Morales*, Attorney General of Texas, *pro se*, *Will Pryor*, First Assistant Attorney General, and *Mary F. Keller*, Deputy Attorney General.

Keith A. Jones argued the cause for respondents. With him on the brief for respondent airlines were *David Wilks Corban*, *Andrew C. Freedman*, and *Ronald D. Secrest*. A brief for 31 State Attorneys General, respondents under this Court's Rule 12.4, in support of petitioner was filed by *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Herschel T. Elkins*, Senior Assistant Attorney General, and *Albert Norman*

Counsel

Sheldon, Deputy Attorney General, *Scott Harshbarger*, Attorney General of Massachusetts, and *Ernest L. Sarason, Jr.*, Assistant Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, and *David Woodward*, Special Assistant Attorney General, *Robert Abrams*, Attorney General of New York, and *Ronna D. Brown* and *Andrea C. Levine*, Assistant Attorneys General, *Charles Cole*, Attorney General of Alaska, and *James Forbes*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, and *Carmen D. Claudio*, Assistant Attorney General, *Gale A. Norton*, Attorney General of Colorado, and *Garth C. Lucero*, First Assistant Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, and *Robert M. Langer*, Assistant Attorney General, *Robert A. Butterworth*, Attorney General of Florida, and *Richard F. Scott*, Assistant Attorney General, *Larry EchoHawk*, Attorney General of Idaho, and *Brett T. Delange*, Deputy Attorney General, *Roland W. Burris*, Attorney General of Illinois, and *Deborah Hagen*, Assistant Attorney General, *Bonnie J. Campbell*, Attorney General of Iowa, and *Steve St. Clair*, Assistant Attorney General, *Robert T. Stephan*, Attorney General of Kansas, and *Dan Kolditz*, Deputy Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Vincent Demarco*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, and *Frederick H. Hoffecker*, Assistant Attorney General, *William L. Webster*, Attorney General of Missouri, and *Clayton S. Friedman*, Assistant Attorney General, *Don Stenberg*, Attorney General of Nebraska, and *Paul N. Potadle*, Assistant Attorney General, *Frankie Sue Del Papa*, Attorney General of Nevada, and *Philip R. Byrnes*, Deputy Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, and *K. D. Sturgis*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, and *David W. Huey*, Assistant Attorney General, *Lee Fisher*, Attorney General of Ohio, and *Mark T.*

Counsel

D'Alessandro, Assistant Attorney General, *Susan B. Loving*, Attorney General of Oklahoma, and *Jane F. Wheeler*, Assistant Attorney General, *Charles Crookham*, Attorney General of Oregon, *Virginia Linder*, Solicitor General, and *Michael Reynolds*, Assistant Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, and *Terrance Hassett* and *Lee Baker*, Special Assistant Attorneys General, *Mark W. Barnett*, Attorney General of South Dakota, and *Jeffrey P. Hallem*, Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, and *Charlotte H. Rappuhn*, Assistant Attorney General, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *J. Wallace Malley, Jr.*, Assistant Attorney General, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Robert F. Manifold*, Assistant Attorney General, *Mario J. Palumbo*, Attorney General of West Virginia, and *Don Darling*, Deputy Attorney General, *James E. Doyle*, Attorney General of Wisconsin, and *James D. Jeffries* and *Barbara Tuerkheimer*, Assistant Attorneys General, and *Joseph B. Meyer*, Attorney General of Wyoming, and *Mark Moran*, Assistant Attorney General.

Stephen L. Nightingale argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Roberts, Assistant Attorney General Gerson, Robert V. Zener, Robert D. Kamenshine*, and *Arthur J. Rothkopf.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Hawaii et al. by *Warren Price III*, Attorney General of Hawaii, and *Girard D. Lau* and *Steven S. Michaels*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Linley E. Pearson* of Indiana, *Richard P. Ieyoub* of Louisiana, *Mike Moore* of Mississippi, *Robert J. Del Tufo* of New Jersey, *Tom Udall* of New Mexico, *Ernest Preate, Jr.*, of Pennsylvania, *Paul Van Dam* of Utah, and *Mary Sue Terry* of Virginia; and for the Public Citizen and Aviation Consumer Action Project by *Cornish F. Hitchcock* and *Alan B. Morrison.*

Briefs of *amici curiae* urging affirmance were filed for American Airlines, Inc., by *Steven C. McCracken* and *Jane G. Allen;* for the American

JUSTICE SCALIA delivered the opinion of the Court.

The issue in this case is whether the Airline Deregulation Act of 1978, 49 U. S. C. App. § 1301 *et seq.*, pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes.

I

Prior to 1978, the Federal Aviation Act of 1958 (FAA), 72 Stat. 731, as amended, 49 U. S. C. App. § 1301 *et seq.*, gave the Civil Aeronautics Board (CAB) authority to regulate interstate airfares and to take administrative action against certain deceptive trade practices. It did not, however, expressly pre-empt state regulation, and contained a "saving clause" providing that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U. S. C. App. § 1506. As a result, the States were able to regulate intrastate airfares (including those offered by interstate air carriers), see, *e. g.*, *California* v. *CAB*, 189 U. S. App. D. C. 176, 178, 581 F. 2d 954, 956 (1978), cert. denied, 439 U. S. 1068 (1979), and to enforce their own laws against deceptive trade practices, see *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290, 300 (1976).

In 1978, however, Congress, determining that "maximum reliance on competitive market forces" would best further "efficiency, innovation, and low prices" as well as "variety [and] quality . . . of air transportation services," enacted the Airline Deregulation Act (ADA). 49 U. S. C. App. §§ 1302(a)(4), 1302(a)(9). To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law "relating to rates, routes, or

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Association of Advertising Agencies, Inc., by *David S. Versfelt* and *Valerie L. Schulte;* and for the Association of National Advertisers, Inc., by *Burt Neuborne* and *Gilbert H. Weil.*

services" of any air carrier. § 1305(a)(1). The ADA retained the CAB's previous enforcement authority regarding deceptive trade practices (which was transferred to the Department of Transportation (DOT) when the CAB was abolished in 1985), and it also did not repeal or alter the saving clause in the prior law.

In 1987, the National Association of Attorneys General (NAAG), an organization whose membership includes the attorneys general of all 50 States, various Territories, and the District of Columbia, adopted Air Travel Industry Enforcement Guidelines (set forth in an Appendix to this opinion) containing detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called "frequent flyers"), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights. These guidelines do not purport to "create any new laws or regulations" applying to the airline industry; rather, they claim to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." NAAG Guidelines, Introduction (1988).

Despite objections to the guidelines by the DOT and the Federal Trade Commission (FTC) on pre-emption and policy grounds, the attorneys general of seven States, including petitioner's predecessor as attorney general of Texas, sent a memorandum to the major airlines announcing that "it has come to our attention that although most airlines are making a concerted effort to bring their advertisements into compliance with the standards delineated in the . . . guidelines for fare advertising, many carriers are still [not disclosing all surcharges]" in violation of § 2.5 of the guidelines. The memorandum said it was the signatories' "purpose . . . to clarify for the industry as a whole that [this practice] is a violation of our respective state laws on deceptive advertising and trade practices"; warned that this was an "advisory memorandum before [the] initiati[on of] any immediate enforcement actions"; and expressed the hope that "protracted

litigation over this issue will not be necessary and that airlines will discontinue the practice . . . immediately." Memorandum from Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin, dated February 3, 1988 (Exhibit A to Exhibit H to Motion for Temporary Restraining Order), App. 123a, 125a. Several months later, petitioner's office sent letters to several respondents serving "as formal notice[s] of intent to sue." Letter from Assistant Attorney General of Texas, dated November 14, 1988, App. 115a.

Those respondents then filed suit in Federal District Court claiming that state regulation of fare advertisements is pre-empted by § 1305(a)(1); seeking a declaratory judgment that, *inter alia*, § 2.5 of the guidelines is pre-empted; and requesting an injunction restraining Texas from taking any action under its law in conjunction with the guidelines that would regulate respondents' rates, routes, or services, or their advertising and marketing of the same. The District Court entered a preliminary injunction to that effect, determining that respondents were likely to prevail on their pre-emption claim. *Trans World Airlines, Inc.* v. *Mattox*, 712 F. Supp. 99, 101–102 (WD Tex. 1989). (It subsequently extended that injunction to 33 other States, *id.*, at 105–106; the propriety of that extension is not before us.) The Court of Appeals affirmed. *Trans World Airlines, Inc.* v. *Mattox*, 897 F. 2d 773, 783–784 (CA5 1990). Subsequently, the District Court, in an unreported order, permanently enjoined the States from taking "any enforcement action" which would restrict "any aspect" of respondents' fare advertising or operations relating to rates, routes, or services. The Court of Appeals once again affirmed. 949 F. 2d 141 (CA5 1991). We granted certiorari. 502 U. S. 976 (1991).

II

Before discussing whether § 1305(a)(1) pre-empts state enforcement of the challenged guidelines, we first consider

whether, assuming that it does, the District Court could properly award respondents injunctive relief. It is a "'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *O'Shea* v. *Littleton*, 414 U. S. 488, 499 (1974); *Younger* v. *Harris*, 401 U. S. 37, 43–44 (1971). In *Ex parte Young*, 209 U. S. 123, 156 (1908), we held that this doctrine does not prevent federal courts from enjoining state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." When enforcement actions are imminent—and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses—there is no adequate remedy at law. See *id.*, at 145–147, 163–165.

We think *Young* establishes that injunctive relief was available here. As we have described, the attorneys general of seven States, including petitioner's predecessor, had made clear that they would seek to enforce the challenged portions of the guidelines (those concerning fare advertising) through suits under their respective state laws. And Texas law, at least, imposes additional liability (by way of civil penalties and consumer treble-damages actions) for multiple violations. See Tex. Bus. & Com. Code Ann. §§ 17.47, 17.50 (1987 and Supp. 1991–1992). Like the plaintiff in *Young*, then, respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.[1]

[1] We do not address whether the District Court should have abstained from entertaining this suit under the line of cases commencing with *Younger* v. *Harris*, 401 U. S. 37 (1971), which imposes heightened require-

The District Court, however, enjoined petitioner not only from enforcing the fare advertising sections of the guidelines, but also from "initiating any enforcement action . . . which would seek to regulate or restrict any aspect of the . . . plaintiff airlines' air fare advertising or the operations involving their rates, routes, and/or services." 712 F. Supp., at 102. In so doing, it disregarded the limits on the exercise of its injunctive power. In suits such as this one, which the plaintiff intends as a "first strike" to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury. See *Public Serv. Comm'n of Utah* v. *Wycoff Co.*, 344 U. S. 237, 240–241 (1952). *Ex parte Young* thus speaks of enjoining state officers *"who threaten and are about to commence proceedings,"* 209 U. S., at 156 (emphasis added); see also *id.*, at 158, and we have recognized in a related context that a conjectural injury cannot warrant equitable relief, see *O'Shea*, *supra*, at 502. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted "any" state suit involving "any aspect" of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the

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ments for an injunction to restrain an already-pending or an about-to-be-pending state criminal action, or civil action involving important state interests, see generally *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, 457 U. S. 423, 431–432, 437 (1982); *Trainor* v. *Hernandez*, 431 U. S. 434, 440–447 (1977); *Younger*, *supra*, at 43–49. Petitioner has not argued for abstention, and the federal-state comity considerations underlying *Younger* are accordingly not implicated. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 500, n. 9 (1984); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U. S. 471, 480 (1977).

injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters.

III

We now turn to the question whether enforcement of the NAAG guidelines on fare advertising through a State's general consumer protection laws is pre-empted by the ADA. As we have often observed, "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp.* v. *Holliday*, 498 U. S. 52, 56–57 (1990) (internal quotation marks omitted); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983). The question, at bottom, is one of statutory intent, and we accordingly "'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Holliday*, *supra*, at 57; *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 194 (1985).

A

Section 1305(a)(1) expressly pre-empts the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . ." For purposes of the present case, the key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose. We have repeatedly recognized that in addressing the similarly worded pre-emption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1144(a), which pre-empts all state laws "insofar as they . . . relate to any employee benefit plan." We have said, for ex-

ample, that the "breadth of [that provision's] pre-emptive reach is apparent from [its] language," *Shaw, supra,* at 96; that it has a "broad scope," *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724, 739 (1985), and an "expansive sweep," *Pilot Life Ins. Co.* v. *Dedeaux,* 481 U. S. 41, 47 (1987); and that it is "broadly worded," *Ingersoll-Rand Co.* v. *McClendon,* 498 U. S. 133, 138 (1990), "deliberately expansive," *Pilot Life, supra,* at 46, and "conspicuous for its breadth," *Holliday, supra,* at 58. True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with or reference to such a plan." *Shaw, supra,* at 97. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with, or reference to, airline "rates, routes, or services" are pre-empted under 49 U. S. C. App. § 1305(a)(1).

Petitioner raises a number of objections to this reading, none of which we think is well taken. First, he claims that we may not use our interpretation of identical language in ERISA as a guide, because the sweeping nature of ERISA pre-emption derives not from the "relates to" language, but from "the wide and inclusive sweep of the comprehensive ERISA scheme," which he asserts the ADA does not have. Brief for Petitioner 33–34. This argument is flatly contradicted by our ERISA cases, which clearly and unmistakably rely on express pre-emption principles and a construction of the phrase "relates to." See, *e. g., Shaw, supra,* at 96–97, and n. 16 (citing dictionary definitions); *Ingersoll-Rand, supra,* at 138–139. Petitioner also stresses that the FAA "saving" clause, which preserves "the remedies now existing at common law or by statute," 49 U. S. C. App. § 1506, is broader than its ERISA counterpart. But it is a commonplace of statutory construction that the specific governs the general, see, *e. g., Crawford Fitting Co.* v. *J. T. Gibbons, Inc.,*

482 U. S. 437, 445 (1987), a canon particularly pertinent here, where the "saving" clause is a relic of the pre-ADA/no pre-emption regime. A general "remedies" saving clause cannot be allowed to supersede the specific substantive pre-emption provision—unless it be thought that a State having a statute requiring "reasonable rates," and providing remedies against "unreasonable" ones, could actually set airfares. As in *International Paper Co.* v. *Ouellette*, 479 U. S. 481, 494 (1987), "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause."

Petitioner contends that § 1305(a)(1) only pre-empts the States from actually prescribing rates, routes, or services. This simply reads the words "relating to" out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to "*regulate* rates, routes, and services." See *Pilot Life*, *supra*, at 50 ("A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate [a matter], a law . . . must be specifically directed toward [it]").[2] Moreover,

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[2] The dissent believes petitioner's position on this point to be supported by the history and structure of the ADA (sources it deems "more illuminating" than a "narrow focus" on the ADA's language, *post*, at 421), because the old regime did not pre-empt the state laws involved here and the ADA's legislative history contains no statements specifically addressed to state regulation of advertising. *Post*, at 421–426. Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning. See, *e. g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 591–592 (1980).

It also bears mention that the rejected Senate bill did contain language that would have produced precisely the result the dissent desires: "No State shall enact any law . . . *determining* routes, schedules, or rates, fares, or charges in tariffs of . . . ." S. 2493, § 423(a)(1), reprinted in S. Rep. No. 95–631, p. 39 (1978) (emphasis added). The dissent is unperturbed by the full Congress' preference for "relating to" over "determining," because the Conference Report gave "no indication that the conferees thought the House's 'relating to' language would have a broader

if the pre-emption effected by § 1305(a)(1) were such a limited one, no purpose would be served by the very next subsection, which preserves to the States certain proprietary rights over airports. 49 U. S. C. App. § 1305(b).

Next, petitioner advances the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the ADA imposes no constraints on laws of general applicability. Besides creating an utterly irrational loophole (there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute), this notion similarly ignores the sweep of the "relating to" language. We have consistently rejected this precise argument in our ERISA cases: "[A] state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand, supra,* at 139; see *Pilot Life, supra,* at 47–48 (common-law tort and contract suits pre-empted); *Metropolitan Life,* 471 U. S., at 739 (state law requiring health insurance plans to cover certain mental health expenses pre-empted); *Alessi* v. *Raybestos-Manhattan, Inc.,* 451 U. S. 504, 525 (1981) (workers' compensation laws pre-empted).

Last, the State suggests that pre-emption is inappropriate when state and federal law are consistent. State and federal law are in fact inconsistent here—the DOT opposes the obligations contained in the guidelines, and Texas law imposes greater liability—but that is beside the point. Nothing in the language of § 1305(a)(1) suggests that its "relating

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pre-emptive scope than the Senate's . . . language," *post,* at 426—which is to say because the Conference Report failed to specify the completely obvious, that "relating to" is broader than "determining." The dissent evidently believes not only that plain statutory language cannot be credited unless specifically explained in legislative history, but also that the apparent import of legislative history cannot be credited unless specifically explained in legislative history.

to" pre-emption is limited to *inconsistent* state regulation; and once again our ERISA cases have settled the matter: "'The pre-emption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements.'" *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 829 (1988); *Metropolitan Life*, *supra*, at 739.

B

It is hardly surprising that petitioner rests most of his case on such strained readings of § 1305(a)(1), rather than contesting whether the NAAG guidelines really "relat[e] to" fares. They quite obviously do. Taking them *seriatim:* Section 2.1, governing print advertisements of fares, requires "clear and conspicuous disclosure [defined as the lesser of one-third the size of the largest typeface in the ad or ten-point type] of restrictions such as" limited time availability, limitations on refund or exchange rights, time-of-day or day-of-week restrictions, length-of-stay requirements, advance-purchase and round-trip-purchase requirements, variations in fares from or to different airports in the same metropolitan area, limitations on breaks or changes in itinerary, limits on fare availability, and "[a]ny other material restriction on the fare." Section 2.2 imposes similar, though somewhat less onerous, restrictions on broadcast advertisements of fares; and § 2.3 requires billboard fare ads to state clearly and conspicuously "'Substantial restrictions apply'" if there are any material restrictions on the fares' availability. The guidelines further mandate that an advertised fare be available in sufficient quantities to "meet reasonably foreseeable demand" on every flight on every day in every market in which the fare is advertised; if the fare will not be available on this basis, the ad must contain a "clear and conspicuous statement of the extent of unavailability." § 2.4. Section 2.5 requires that the advertised fare include all taxes and surcharges; round-trip fares, under § 2.6, must be dis-

closed at least as prominently as the one-way fare when the fare is only available on round trips; and § 2.7 prohibits use of the words "'sale,' 'discount,' [or] 'reduced'" unless the advertised fare is available only for a limited time and is "substantially below the usual price for the same fare with the same restrictions."

One cannot avoid the conclusion that these aspects of the guidelines "relate to" airline rates. In its terms, every one of the guidelines enumerated above bears a "reference to" airfares. *Shaw*, 463 U. S., at 97. And, collectively, the guidelines establish binding requirements as to how tickets may be marketed if they are to be sold at given prices. Under Texas law, many violations of these requirements would give consumers a cause of action (for at least actual damages, see Tex. Bus. & Com. Code Ann. § 17.50 (1987 and Supp. 1991–1992)) for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the mandated explanations and disclaimers. This case therefore appears to us much like *Pilot Life*, in which we held that a common-law tort and contract action seeking damages for the failure of an employee benefit plan to pay benefits "relate[d] to" employee benefit plans and was pre-empted by ERISA. 481 U. S., at 43–44, 47–48.

In any event, beyond the guidelines' express reference to fares, it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares. Advertising "serves to inform the public of the . . . prices of products and services, and thus performs an indispensable role in the allocation of resources." *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 364 (1977). Restrictions on advertising "serv[e] to increase the difficulty of discovering the lowest cost seller . . . and [reduce] the incentive to price competitively." *Id.*, at 377. Accordingly, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertis-

ing." *Ibid.* As Judge Easterbrook succinctly put it, compelling or restricting "[p]rice advertising surely 'relates to' price." *Illinois Corporate Travel* v. *American Airlines, Inc.*, 889 F. 2d 751, 754 (CA7 1989), cert. denied, 495 U. S. 919 (1990).

Although the State insists that it is not compelling or restricting advertising, but is instead merely preventing the market distortion caused by "false" advertising, in fact the dynamics of the air transportation industry cause the guidelines to curtail the airlines' ability to communicate fares to their customers. The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers). Accordingly, airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). In order for this marketing process to work, and for it ultimately to redound to the benefit of price-conscious travelers, the airlines must be able to place substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate), and must be able to advertise the lower fares. The guidelines severely burden their ability to do both at the same time: The sections requiring "clear and conspicuous disclosure" of each restriction make it impossible to take out small or short ads, as does (to a lesser extent) the provision requiring itemization of both the one-way and round-trip fares. Since taxes and surcharges vary from State to State, the requirement that advertised fares include those charges forces the airlines to create different ads in each market. The section restricting

the use of "sale," "discount," or "reduced" effectively prevents the airlines from using those terms to call attention to the fares normally offered to price-conscious travelers. As the FTC observed, "[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive." Letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988, App. to Brief for Respondent Airlines 23a. Further, § 2.4, by allowing fares to be advertised only if sufficient seats are available to meet demand or if the extent of unavailability is disclosed, may make it impossible to use this marketing process at all. All in all, the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge.[3]

In concluding that the NAAG fare advertising guidelines are pre-empted, we do not, as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relat[e] to" rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect. 463 U. S., at 100, n. 21. In this case, as in *Shaw*, "[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.* Finally, we note that our decision does not give the airlines *carte blanche* to lie to and deceive consumers; the

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[3] The dissent disagrees with this—not, as it turns out, because it disputes our description of the pricing process in the airline industry, but because it does not think that the guidelines would have a "significant" effect on rates. *Post*, at 427. That conclusion is unexplained, and seems to us inexplicable.

DOT retains the power to prohibit advertisements which in its opinion do not further competitive pricing, see 49 U. S. C. App. § 1381.

* * *

We hold that the fare advertising provisions of the NAAG guidelines are pre-empted by the ADA, and affirm the judgment of the Court of Appeals insofar as it awarded injunctive and declaratory relief with respect to those provisions. Insofar as that judgment awarded injunctive relief directed at other matters, it is reversed and the injunction vacated.

It is so ordered.

JUSTICE SOUTER took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

National Association of Attorneys General
Task Force on the Air Travel Industry
Revised Guidelines

INTRODUCTION

In June, 1987, the National Association of Attorneys General ("NAAG") directed the appointment of a Task Force of states to study the advertising and marketing practices of the airline industry in the United States. In addition to the study, the Task Force was directed to determine the nature and extent of existing unfair and deceptive airline advertising practices and to report a recommended course of action to NAAG at its meeting in December 1987.

The Task Force Report and Recommendations were adopted by NAAG at its winter meeting on December 12, 1987, with a continuing direction to the Task Force (1) to receive and examine any comments from industry, consumer groups, federal agencies, and other interested parties; (2) to evaluate these comments; and (3) to report to NAAG at its

Spring 1988 meeting on the advisability of any modifications of the Guidelines.

The Task Force received written comments from the Air Transport Association, the American Association of Advertising Agencies, American Airlines, the Association of National Advertisers, the Council of Better Business Bureaus, the Federal Trade Commission, the National Association of Broadcasters, Southwest Airlines, United Airlines, USAir, and the U. S. Department of Transportation. Assistant attorneys general of the Task Force states evaluated these comments, and reported their recommendations to NAAG.

On March 15, 1988, NAAG adopted the recommended changes to the frequent flyer Guidelines and directed that the comments to both the fare advertising and frequent flyer Guidelines be changed to respond to valid concerns raised by those filing comments. The Guidelines and comments herein reflect the changes directed by NAAG.

NAAG also directed the chair of NAAG's Consumer Protection Committee to appoint four attorneys general to serve on a continuing task force to evaluate the effectiveness of the Guidelines and to continue discussions with members of the industry and other interested parties. These attorneys general are: John Van de Kamp (California), Neil F. Hartigan (Illinois), Jim Mattox (Texas), and Kenneth O. Eikenberry (Washington).

It is important to note that these Guidelines do not create any new laws or regulations regarding the advertising practices or other business practices of the airline industry. They merely explain in detail how existing state laws apply to air fare advertising and frequent flyer programs. Each Guideline is followed by a comment which summarizes:

- NAAG's intent with respect to that Guideline.
- Any relevant comments received by the Task Force.
- Any significant changes that were made to the Guidelines.

Appendix to opinion of the Court

Section 1—Definitions

1.0 Advertisement means any oral, written, graphic or pictorial statement made in the course of solicitation of business. Advertisement includes, without limitation, any statement or representation made in a newspaper, magazine or other public publication, or contained in any notice, sign, billboard, poster, display, circular, pamphlet, or letter (collectively called "print advertisements"), or on radio or television ("broadcast commercials").

Comment: This definition encompasses those materials and media covered by most states' false advertising statutes. "Print advertisements" and "broadcast commercial" are separated into different categories because they are afforded slightly different treatment under these Guidelines. This represents a change from an earlier draft of the Guidelines and is an attempt to address some of the airlines' concerns regarding the difficulties of lengthy disclosures in broadcast commercials.

1.1 Award means any coupon, certificate, voucher, benefit or tangible thing which is promised, given, sold or otherwise transferred by an airline or program partner to a program member in exchange for mileage, credits, bonuses, segments or other units of value credited to a consumer as an incentive to fly on any airline or to do business with any program partner.

Comment: This definition, as well as definitions 1.2, 1.3, 1.4, 1.6, 1.9, and 1.10, is self-explanatory.

1.2 Award level means a specified amount of mileage or number of credits, bonuses, segments or other units which a program member must accumulate in order to receive an award.

1.3 Blackout date means any date on which travel or use of other program benefits is not permitted for program members seeking to redeem their award levels. This is a form of capacity control.

1.4 Capacity control means the practice by which an airline or program partner restricts or otherwise limits the opportunity of program members to redeem their award levels for travel or other benefits offered in the program.

1.5 Clear and conspicuous means that the statement, representation or term ("statement") being disclosed is of such size, color contrast, and audibility and is so presented as to be readily noticed and understood by the person to whom it is being disclosed. All language and terms should be used in accordance with their common or ordinary usage and meaning. For example, "companion" should be used only when it means any companion (*i. e.*, any person traveling with the program member), not solely family members. Without limiting the requirements of the preceding sentences:

(a) A statement in a print advertisement is considered clear and conspicuous if a type size is used which is at least one-third the size of the largest type size used in the advertising. However, it need not be larger than:

- 10-point type in advertisements that are 200 square inches or smaller, and
- 12-point type in advertisements that are larger than 200 square inches.

If the statement is in the body copy of the advertisement, it may be in the same size type as the largest type used in the body copy, and does not have to meet these type-size requirements.

(b) A statement in a broadcast commercial is considered clear and conspicuous if it is made orally and is as clear and understandable in pace and volume as the fare information.

(c) A statement on any billboard is considered clear and conspicuous if a type is used which is at least one-third the size of the largest one size used on the billboard.

(d) A statement required by Section 3, relating to frequent flyer programs, is considered clear and conspicuous if it is prominently located directly adjacent to the materials to which it applies. Type size should be no smaller than the most commonly-used print size in the document, but in no event smaller than 10-point type. Any reservation of any right to make future changes in the program or award levels should be located prominently at the beginning of printed materials.

Comment: One of the most deceptive aspects of current air fare advertisements is the completely inadequate manner in which those advertisements disclose the restrictions and limitations which apply to the advertised fares. The restrictions disclosed in print advertisements are rarely located near the fare advertised and often appear only in extremely small type at the bottom of the advertisement. In broadcast commercials, such disclosures are generally absent from radio advertisements, and if included at all in television commercials appear as written disclosures flashed on the screen much too quickly for the average person to read. On billboards any mention of restrictions on advertised fares is unusual.

Given this background, NAAG believes that it is necessary to define clearly for the airlines what constitutes clear and adequate disclosure in all advertising media. The type-size minima for print advertisements are aimed at making the disclosures both easy to read and noticeable. Consequently, a slightly larger size print is suggested in larger size advertisements. These type-size minima are not absolute. That is, print disclosures do not in every instance have to be in at least 10-point type, as long as they are clear and conspicuous regardless of the size of the type. The type size suggestions are merely examples of advertising practices which give an airline a reasonable expectation that it will not be sued if it follows the Guidelines. In the

Task Force's meetings with the airlines last summer, one common note expressed was that the airlines could abide by disclosure guidelines, as long as they were clear and enforced uniformly. If an airline does not choose this safe harbor and instead ventures into untested waters, it may run aground and it may not. But it is free to do so.

The comments to this Guideline were critical largely because NAAG singled out airline advertisements for this treatment. However, on the whole, the airlines indicated they could meet the type size standard relatively easily in print advertisements.

NAAG elected to encourage oral disclosures in broadcast media, because written disclosures are difficult if not impossible to read and because many people listen to, rather than watch television commercials. We continue to believe that oral disclosure is the best method of conveying information in a television commercial. However, the converse of this Guideline is not true—a disclosure in a television commercial is not necessarily deceptive if it is instead made in a video super or crawl, as long as it is still clear and conspicuous.

For safety reasons, very large type is provided for billboards.

1.6 Frequent flyer program means any program offered by an airline or program partner in which awards are offered to program members.

1.7 Limited-time availability means that the fare is only available for a specific period of time or that the fare is not available during certain blackout periods.

Comment: This definition applies to air fares that are only available certain times of the year (e. g., available December 15 through April 15), are not available at certain times at all (not available December 23 through January 5), or are only available until a date certain (available only until January 15). It does not apply to fares that are un-

available only on certain days of the week or times of the day.

1.8 Material restriction means a restriction, limitation, or other requirement which affects the use or refundability of a ticket, and which is not generally applicable to all classes of fares or tickets (such as standard conditions of carriage).

Comment: Due to the numerous standard conditions applicable to most airline tickets, NAAG has confined the definition of "material restrictions" to those restrictions and limitations that are specific and unique to certain fare categories (i. e., those that are different from the restrictions and limitations that apply to a standard coach ticket).

1.9 Program member means any consumer who has applied and been accepted for membership in an airline's frequent flyer program, regardless of whether he or she has accrued mileage, credits, bonuses, segments or other units of value on an airline or with any program partner.

1.10 Program partner means any business entity which provides awards as part of an airline's frequent flyer program.

1.11 Vested member means a member of a frequent flyer program who is enrolled in an existing program and has provided consideration to the airline or its partners, and who has not received adequate notice of program changes such as set forth in Sections 3.2 and 3.9. For example, consideration includes purchasing tickets on an airline, renting a car or using a specific credit card.

Comment: This definition separates out those consumers who joined a frequent flyer program without receiving adequate notice of how that program could change prospectively. The Guidelines afford some special protections to vested members and vested miles. There is sound reason for this.

After reviewing the travel reward promotional materials for most of the major airlines, NAAG concluded that currently vested members have not received adequate disclo-

sure of the potential for significant increases in award levels or imposition of other restrictions which may result in the airlines' unilateral devaluation of awards. Therefore, the Guidelines treat vested members and the miles which members accrued before receiving adequate notice of prospective changes differently.

1.12 Vested mile means program mileage (or other credits) accumulated by a vested member before that person receives adequate notice of program changes, as set forth in Sections 3.2 and 3.9.

Comment: This definition identifies any mileage or credit accrued by a vested member before he or she received adequate notice regarding the possibility of future detrimental changes in the program. See the comments to the definition of vested member.

Section 2—Fare Advertisements

2.0 General guideline

Any advertisement which provides air fares or other price information must be in plain language, clear and conspicuous, and non-deceptive. Deception may result not only from a direct statement in the advertisement and from reasonable inferences therefrom, but also omitting or obscuring a material restriction.

Comment: This Guideline and the following Guidelines restate individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising.

2.1 Disclosure in print advertisements

Print advertisements for fares must make clear and conspicuous disclosure of restrictions such as:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- Time of day or day of week restrictions.
- Length of stay requirements.

- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.
- The statement, if any, required by Guideline 2.4.
- Any other material restriction on the fare.

This Guideline would be met by disclosing material restrictions either:

- in the body copy of the advertisement,
- adjacent to the fare price, or
- in a box with a heading such as "Restrictions."

Examples (in 10-point type) of disclosures of material restrictions if they apply to fares being advertised are:

In the body copy:

RESTRICTIONS. "Weekend traveler" fares are generally available all day Saturday and Sunday until 6 p.m. However, these fares are not available on some flights on some days.

In the box:

Restrictions

These restrictions apply to one or more of these fares:
- 30 day advance purchases required
- Not available November 20–December 1
- New York fares only to Newark Airport

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or

Restrictions. Advertised fares are only available Tuesday, Wednesday, and Thursday afternoons. Three-day advance purchases required. 50% cancellation penalty applies.

Comment: The advantage to consumers of print advertisements over television or radio advertisements is that they give consumers something tangible to use as a reference when shopping for low cost air fares. Because consumers can take their time and carefully read a print advertisement it is especially important that this type of advertisement contain the most accurate and complete information possible regarding any advertised air fares. The restrictions singled out by NAAG in this Guideline for disclosure are those NAAG believes are the most significant to a consumer contemplating purchasing a ticket. An advertisement that complies with this Guideline will give a consumer three crucial pieces of information:

1. Eligibility—consumers will know if they are eligible for the fare (i. e., can a consumer meet advance purchase requirements or other restrictions affecting time or date of travel?);

2. Availability—consumers can accurately gauge the likelihood that they will be able to obtain a ticket at the advertised price; and

3. Risk—consumers will know the risks associated with purchasing a ticket at the advertised price (i. e., is the ticket non-refundable or do other penalties apply upon cancellation or changes in itinerary?).

This particular Guideline received a great deal of negative comment because the airlines and government agencies misunderstood it to mean that it required full disclosure of all of the restrictions that apply to each specific flight. This is not correct. The Guideline only requires that if any of the restrictions listed in the Guideline apply to any of the air fares advertised then the advertisement must disclose the existence of that restriction and the fact that the restriction applies to one or more of the air fares advertised. To clear up this misunderstanding, NAAG included specific examples of the disclosures required by the revised Guidelines. There was also some misunderstanding that disclosure in

a box was required. As the Guideline states, this is just one option.

The comments made to the December Guidelines evidenced another misconception about the wording of the disclosures on fare restrictions. This Guideline provides suggested wording, again to assist the airlines in determining how to meet the disclosures, but the language is by no means sacrosanct. The best creative minds in the advertising business are available to the airlines through their advertising agencies. The airlines are free to avail themselves of these talents, who are certainly adept at phrasing a message the advertiser wants to get across to the consumer. The essence of the Guidelines is that consumers must be advised of the limits which the airlines has [sic] chosen to impose on consumers' ability to buy tickets at the advertised price.

2.2 Disclosure in broadcast commercials

Broadcast commercials for fares must make clear and conspicuous disclosure of:

- Limited-time availability.
- Limitations on right to refund or exchange of ticket.
- The statement, if any, required by Guideline 2.4.

In addition, if the following seven disclosures are not made in a clear and conspicuous manner in the commercial, any that are applicable must be disclosed orally to the passenger before reservations are actually made:

- Time of day or day of week restrictions.
- Length of stay requirements.
- Advance purchase requirements.
- Round trip purchase requirements.
- Variations in fares to or from two or more airports serving the same metropolitan area.
- Limitations on, or extra charges for, breaks or changes in itinerary, such as failure to travel on every leg as scheduled.

- Any other material restriction in the fare.

As to these seven types of disclosure, the airline may include any or all in the commercial or may choose to defer disclosure until the time reservations are actually made.

If any of these seven disclosures applies to the fare advertised and the airline chooses to defer disclosure until the time the reservations are actually made, the commercial must give clear and conspicuous disclosure that "Other substantial restrictions apply," or similar language. The statement "Restrictions apply" is not sufficient.

Comment: In an earlier draft, the Guidelines required that radio and television advertisements include all the same disclosures required in print advertisements. The airline industry unanimously responded that such detailed disclosures would be impossible to include in the 15 and 30 second advertising spots generally purchased for radio and television ads, and argued that, even if time allowed this much oral disclosure, the resulting commercial would provide too much information for a consumer to absorb usefully. They concluded that such a requirement would eliminate airline price advertising on television and radio.

The provision of fare information, without stating the most significant restrictions that apply to the fare advertised, is deceptive and ultimately harmful to consumers and the airline industry alike.

The Guideline as revised provides a compromise. It suggests disclosure of the three most serious restrictions that can apply to an airline ticket—limited time availability, nonrefundability or exchangeability and limitations on fare availability. Disclosure of all of these restrictions can be accomplished by something as simple as the following statement: "Tickets are nonrefundable, are not available on all flights, and must be purchased by December 15. Other significant restrictions apply." These 20 words can easily be read in a 30 second commercial. In addition, some or all of this information may be clearly and conspicuously

disclosed in a video super or crawl in television commercials. Of course, this option is not available for radio commercials. However, commenting airlines confirmed that the typical radio spot is 60 seconds, making the concern about time less crucial.

Airlines then have the option of disclosing any additional material restrictions in the advertisement itself or deferring such disclosure until a consumer makes a reservation. Of course, if an airline does not choose to restrict its fare severely, fewer words (and thus, less air time) is needed.

This compromise position also recognizes that print advertising lends itself more readily to detailed information in a form which the consumer can retain and refer to at his own pace. For this reason, NAAG has chosen to require less disclosure in broadcast, allowing print to be the medium for full disclosure.

2.3 Disclosure on billboards

Any billboard which provides air fare or other price information on a fare to which any material restrictions apply must have clear and conspicuous language such as "Substantial restrictions apply." The statement "Restrictions apply" is not sufficient.

Comment: For safety reasons, NAAG concluded that lengthy written disclosures on billboards are inappropriate and potentially hazardous to drivers. We disagree with the DOT that this special treatment of price advertising on billboards will result in a proliferation of billboards on our nation's highways.

2.4 Fare availability

Any advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement

appears and continuing for at least three days after the advertisement terminates.

However, if the advertised fare is not thus available, the advertisement must contain a clear and conspicuous statement to the extent of unavailability of the advertised fare.

Statements such as "Seats limited" and "Restrictions apply" do not meet this Guideline. These examples do meet this Guideline:

- This fare may not be available when you call.
- This fare is not available on all flights.
- This fare is only available on some Saturday and Sunday flights.

Comment: This Guideline elicited the greatest amount of negative comments from the airline industry, the ATA, FTC and the DOT. They argue that this Guideline is impossible to implement because, due to the complexity of airline pricing systems, the number of seats available at a particular low fare on a particular flight is not a fixed number. It is continuously modified up to the point of departure. They suggest that it is acceptable for the airlines to communicate a general invitation to the public to buy low fare seats, but then reduce the number of seats available to zero or close to zero for the most popular flights, because the possibility that a consumer can purchase a seat at the advertised price exists at the time the advertisement is placed.

The complexity of the airlines' system cannot justify the unfairness of such an approach. No other retailer would be allowed to justify a failure to stock an advertised item on the grounds that, at the last minute the retailer decided it was less costly not to stock the item it had just advertised. The availability of an item advertised, at the price advertised, goes to the very heart of truthful advertising. If an airline advertises an air fare that is not available on each and every flight to the destination advertised, and this fact

is not disclosed, then the advertisement is deceptive on its face.

While NAAG appreciates the difficulty of disclosing the specific number of seats available on each flight advertised, a disclosure that "This fare is not available on all flights" or "This fare may not be available when you call" is not particularly onerous. Absent such disclosure, airlines, as all other retailers, should be required to have sufficient stock available to meet reasonable demand for any fare advertised.

2.5 Surcharges

Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare.

Comment: Recently, several airlines considered the possibility of passing along an increase in the cost of fuel to consumers by imposing a "fuel surcharge" rather than simply raising air fares to reflect their increased costs. The air fare advertised was to remain the same, but a footnote would be added to the advertisement in the "mice type" disclosing that, for instance, a $16 fuel surcharge would be tacked on to the advertised fare. The potential for abuse, if this type of price advertising is permitted, is obvious. It would only be a matter of time before $19 air fares from New York to California could be advertised with $300 meal, fuel, labor, and baggage surcharges added in a footnote. The total advertised price of the fare must include all such charges in order to avoid these potential abuses. However, this Guideline should not be construed to require an airline to do the impossible. We do not believe that such minimal tour-related charges fall within the meaning of "fare" and therefore do not believe that unknown charges must be disclosed as a surcharge (if the amounts are not in fact known). This of course does not mean that charges which are known—either as an exact amount or as a percentage—do not have to be disclosed in advertisements.

2.6 Round trip fare advertising

If an airline elects to advertise the one-way portion of a fare that is only available as a round-trip purchase, this restriction, together with the full round-trip fare, must be advertised in a clear and conspicuous manner, at least as prominently as the one-way fare.

Comment: Airlines routinely advertise one-half of the price (i. e., the alleged "one-way" price) for tickets that are only available if a consumer makes a round-trip purchase. Under this Guideline, if an airline elects to continue this advertising practice, it must also disclose that the fare is only available if a consumer purchases a round trip ticket and the actual price of the full round trip ticket. The disclosure must be made in a type size and location as prominent as the fare advertised.

The airlines have, for the most part, stated a willingness to advertise the full round trip air fare if all of the airlines do the same. This Guideline is intended to encourage all airlines to adopt this practice.

2.7 Deceptive use of "sale," "discount," "reduced," or similar terms

A fare may be advertised by use of the words "sale," "discount," "reduced," or other such words that suggest that the fare advertised is a temporarily reduced fare and is not a regularly-available fare only if that fare is:

- available only for a specified, limited period of time, and
- substantially below the usual price for the same fare with the same restrictions.

Comment: The majority of airline tickets sold each year sell at prices significantly lower than the full "Y" or standard regular coach fare. These lower fares are offered year round and airlines in theory allocate a certain amount of seats to each fare "bucket." As a result, the regular coach

fare has ceased to have any meaning as a starting point for determining whether or not a ticket is being offered for a "sale" price as consumers have come to understand that term.

In this Guideline NAAG has attempted to prevent consumer confusion by limiting the use of such words as "sale," "discount," or "reduced," to describe only those fares that represent a true savings over regularly available air fares—those that are available only for short periods of time and are substantially below any regularly offered fare for a ticket carrying identical restrictions.

Section 3—Frequent Flyer Programs

General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a nondeceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the re-

quested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately disclosed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airlines on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window"—15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period. A reasonable period would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested mem-

bers. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice.

2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples

which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

> "Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

> "(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

> "(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

> "In any case, (Airline) will make award travel available within ___ days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage accrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the

major airlines attempted unilaterally to change their programs in the winter of 1986–87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate, (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed reasonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the Guidelines require that any airline with a policy of deleting

program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only in conjunction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a reasonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets.

Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in frequent flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicuous manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the maximum number of people see and read this restriction. The Guideline permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction—that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

Section 4—Compensation for Voluntary Denied Boarding

4.0 Disclosure of policies

If an airline chooses to offer ticketed passengers incentives to surrender their tickets on overbooked flights, the airline must clearly and conspicuously disclose all terms and conditions of the proposal—including any restrictions on offers of future air travel—to the person to whom the offer is made, and in the same manner in which the offer is made, before the person accepts the offer.

Comment: Federal regulations offer specific protections and certain rights to individuals who are involuntarily bumped from a flight. Airlines, however, are free to offer whatever compensation they want to people who voluntarily give up their seat on an airplane because of overbooking. For economic reasons, airlines prefer to offer vouchers good for free tickets on future flights, instead of cash compensation to these passengers.

While these vouchers may seem very attractive to a consumer who has the flexibility to wait for a later flight, many carry serious restrictions on their use or are subject to lengthy black out periods when they cannot be used.

This Guideline requires that airlines fully disclose any and all restrictions on offers for future air travel, before a consumer agrees to give up his or her seat. It does not, as several airlines and government agencies argued in their responsive comments, set any standards for the type of compensation that airlines must offer to these passengers.

CONCLUSION

Consumer dissatisfaction with the airline industry has reached crisis proportions. Federal agencies have focused their attention on airline scheduling problems, on-time performance, safety, and other related issues, but have not addressed airline advertising and frequent flyer programs. Un-

checked, the airlines have engaged in practices in these areas that are unfair and deceptive under state law. The individual states through NAAG can play an important role in eliminating such practices through these Guidelines.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

In cases construing the "virtually unique pre-emption provision" in the Employee Retirement Income Security Act of 1974 (ERISA), see *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 24, n. 26 (1983), we have given the words "relate to" a broad reading. The construction of that unique provision was supported by a consideration of the relationship between different subsections of ERISA that have no parallel in other federal statutes, see *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 98 (1983), and by the legislative history of the provision, *id.*, at 98–99. Today we construe a pre-emption provision in the Airline Deregulation Act of 1978 (ADA), 49 U. S. C. App. § 1301 *et seq.*, a statute containing similar, but by no means identical, language. Instead of carefully examining the language, structure, and history of the ADA, the Court decides that it is "appropriate," given the similarity in language, to give the ADA pre-emption provision a similarly broad reading. *Ante*, at 384. In so doing, the Court disregards established canons of statutory construction, and gives the ADA pre-emption provision a construction that is neither compelled by its text nor supported by its legislative history.

I

"In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 738 (1985) (internal quotation marks omitted). At the same time, our pre-emption analysis "must be guided by respect for the separate spheres of gov-

ernmental authority preserved in our federalist system." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 522 (1981). We therefore approach pre-emption questions with a "presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation." *Metropolitan Life*, 471 U. S., at 740.

Section 105(a) of the ADA provides, in relevant part, "no State or political subdivision thereof . . . shall enact or enforce any law . . . relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U. S. C. App. § 1305(a). By definition, a state law prohibiting deceptive or misleading advertising of a product "relates," "pertains," or "refers" first and foremost to the *advertising* (and, in particular, to the deceptive or misleading aspect of the advertising) rather than to the product itself. That is not to say, of course, that a prohibition of deceptive advertising does not also relate indirectly to the particular product being advertised. It clearly does, for one cannot determine whether advertising is misleading without knowing the characteristics of the product being advertised. But that does not alter the fact that the prohibition is designed to affect the nature of the advertising, not the nature of the product.[1]

[1] The court in a similar case arising in New York explained this distinction well:

"[A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care about how much Pan Am charges, where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers. Thus, as far as New York is concerned, Pan Am is free to charge $200 or $2,000 for a flight from LaGuardia to London, but it cannot take out a full-page newspaper advertisement telling consumers the fare is $200 if in fact it is $2,000. Similarly, Pan Am remains free to route a plane from Ithaca to Istanbul with as many stops in between as it chooses, but it cannot market that flight to New York consumers as a 'direct' flight." *New York* v. *Trans World Airlines, Inc.*, 728 F. Supp. 162, 176 (SDNY 1989); see also *People*

Thus, although I agree that the plain language of § 105(a) pre-empts any state law that relates directly to rates, routes, or services, the presumption against pre-emption of traditional state regulation counsels that we not interpret § 105(a) to pre-empt every traditional state regulation that might have some indirect connection with, or relationship to, airline rates, routes, or services unless there is some indication that Congress intended that result. To determine whether Congress had such an intent, I believe that a consideration of the history and structure of the ADA is more illuminating than a narrow focus on the words "relating to."

II

The basic economic policy of the Nation is one favoring competitive markets in which individual entrepreneurs are free to make their own decisions concerning price and output. Since 1890 the Sherman Act's prohibition of collusive restrictions on production and pricing have been the central legislative expression of that policy. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 695 (1978). In 1914 Congress sought to promote that policy by enacting the Federal Trade Commission Act (FTCA), which created the Federal Trade Commission and gave it the power to prohibit "[u]nfair methods of competition in commerce." 38 Stat. 719, codified as amended, 15 U. S. C. § 45(a)(1). That type of prohibition is entirely consistent with a free market in which prices and production are not regulated by Government decree.

In 1938 Congress enacted two statutes that are relevant to today's inquiry. In March it broadened § 5 of the FTCA by giving the Commission the power to prohibit "unfair or deceptive acts or practices in commerce" as well as "[u]nfair

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v. *Western Airlines, Inc.*, 155 Cal. App. 3d 597, 600, 202 Cal. Rptr. 237, 238 (1984), cert. denied, 469 U. S. 1132 (1985); Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 Harv. L. Rev. 842, 857 (1989).

methods of competition in commerce." 52 Stat. 111, codified at 15 U. S. C. § 45(a)(1). Three months later it enacted the Civil Aeronautics Act of 1938. § 411, 52 Stat. 1003. That statute created the Civil Aeronautics Board and mandated that it regulate entry into the interstate airline industry, the routes that airlines could fly, and the fares that they could charge consumers.[2] 52 Stat. 987–994. Moreover, the statute contained a provision, patterned after § 5 of the FTCA, giving the Civil Aeronautics Board the power to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation." 52 Stat. 1003; see also *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U. S. 79, 82 (1956). But the Board's power in this regard was not exclusive, for the statute also contained a "saving clause" that preserved existing common-law and statutory remedies for deceptive practices.[3] See 52 Stat. 1027; *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290, 298–300 (1976).

Although the 1938 Act was replaced by a similar regulatory scheme in 1958,[4] the principal provisions of the statute remained in effect until 1978. In that year, Congress decided to withdraw economic regulation of interstate airline rates, routes, and services. Congress therefore enacted the ADA "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." H. R. Conf. Rep. No. 95–1779, p. 53 (1978). Because that goal would obviously have been frustrated if state regulations

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[2] The Civil Aeronautics Board was created and established under the name "Civil Aeronautics Authority," but was redesignated as the "Civil Aeronautics Board" by Reorganization Plan No. IV of 1940. See 49 U. S. C. App. § 1321(a)(1) (1982 ed.), repealed effective January 1, 1985, by 49 U. S. C. App. § 1551(a)(3).

[3] Section 1106 of the Civil Aeronautics Act of 1938 provided:

"Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." 52 Stat. 1027.

[4] Federal Aviation Act of 1958, Pub. L. 85–726, 72 Stat. 731.

were substituted for the recently removed federal regulations, Congress thought it necessary to pre-empt such state regulation. Consequently, Congress enacted § 105(a) of the Act, which pre-empts any state regulation "relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation." 49 U. S. C. App. § 1305(a)(1).

At the same time, Congress retained § 411, which gave the Civil Aeronautics Board the power to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation." 49 U. S. C. App. § 1381(a). Congress also retained the saving clause that preserved common-law and statutory remedies for fraudulent and deceptive practices. See § 1506; *Nader*, 426 U. S., at 298–300. Moreover, the state prohibitions against deceptive practices that had coexisted with federal regulation in the airline industry for 40 years, and had coexisted with federal regulation of unfair trade practices in other areas of the economy since 1914,[5] were not mentioned in either the ADA or its legislative history.

In short, there is no indication that Congress intended to exempt airlines from state prohibitions of deceptive advertising. Instead, this history suggests that the scope of the

[5] The FTCA does not, by its own force, pre-empt state prohibitions of unfair and deceptive trade practices. Thus, unless a state prohibition conflicts with a Federal Trade Commission rule, state laws and regulations are not pre-empted. See, *e. g.*, *American Financial Services Assn.* v. *FTC*, 247 U. S. App. D. C. 167, 199–200, 767 F. 2d 957, 989–991 (1985); Verkuil, Preemption of State Law by the Federal Trade Commission, 1976 Duke L. J. 225.

Because the Department of Transportation has authority to prohibit unfair or deceptive practices and unfair methods of competition in air transportation, 49 U. S. C. App. § 1381, it, too, could promulgate regulations that would pre-empt inconsistent state laws and regulations. But the Court does not rest its holding on the fact that the state prohibitions of unfair and deceptive advertising conflict with federal regulations; instead, it relies on the much broader holding that the ADA itself pre-empts state prohibitions of deceptive advertising.

prohibition of state regulation should be measured by the scope of the federal regulation that was being withdrawn.

This is essentially the position adopted by the Civil Aeronautics Board, which interpreted the scope of § 105 in light of its two underlying policies—to prevent state economic regulation from frustrating the benefits of federal deregulation, and to clarify the confusion under the prior law which permitted some dual state and federal regulation of the rates and routes of the same carrier. 44 Fed. Reg. 9948, 9949 (1979). The Board thus explained:

> "Section 105 forbids state regulation of a federally authorized carrier's routes, rates, or services. Clearly, states may not interfere with a federal carrier's decision on how much to charge or which markets to serve. . . . Similarly, a state may not interfere with the services that carriers offer in exchange for their rates. . . .
>
> . . . . .
>
> "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provision of the *quid pro quo* for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing . . . ." *Id.*, at 9950–9951.

See also Freeman, State Regulation of Airlines and the Airline Deregulation Act of 1978, 44 J. Air L. & Com. 747, 766–767 (1979).

Because Congress did not eliminate federal regulation of unfair or deceptive practices, and because state and federal prohibitions of unfair or deceptive practices had coexisted during the period of federal regulation, there is no reason to believe that Congress intended § 105(a) to immunize the airlines from state liability for engaging in deceptive or misleading advertising.

III

The Court finds in Congress' choice of the words "relating to" an intent to adopt a broad pre-emption provision, analogous to the broad ERISA pre-emption provision. See *ante*, at 383–384. The legislative history does not support that assumption, however. The bill proposed by the Civil Aeronautics Board provided that "[n]o State . . . shall enact any law . . . relating to rates, routes, or services in air transportation." Hearings on H. R. 8813 before the Subcommittee on Aviation of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess., pt. 1, p. 200 (1977). Yet the Board's accompanying prepared testimony neither focused on the "relating to" language nor suggested that those words were intended to effect a broad scope of pre-emption; instead, the testimony explained that the pre-emption section was "added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.*, at 243.

The "relating to" language in the bill that was finally enacted by Congress came from the House bill. But the House Committee Report—like the Civil Aeronautics Board—did not describe the pre-emption provision in the broad terms adopted by the Court today; instead, the Report described the scope of the pre-emption provision more narrowly, saying that it "provid[ed] that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services." H. R. Rep. No. 95–1211, p. 16 (1978).

The pre-emption section in the Senate bill, on the other hand, did not contain the "relating to" language. That bill provided, "[n]o State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations

for, any air carrier . . . ." S. 2493, § 423(a)(1), reprinted in S. Rep. No. 95–631, p. 39 (1978). The Senate Report explained that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.*, at 98.

The Conference Report explained that the Conference adopted the House bill (with an exception not relevant here), which it described in the more narrow terms used in the House Report. H. R. Conf. Rep. No. 95–1779, pp. 94–95 (1978). There is, therefore, no indication that the conferees thought the House's "relating to" language would have a broader pre-emptive scope than the Senate's "determining . . . or otherwise promulgate economic regulation" language.[6] Nor is there any indication that the House and conferees thought that the pre-emption of state laws "relating to rates, routes, or services" pre-empted substantially more than state laws "regulating rates, routes, or services."

IV

Even if I were to agree with the Court that state regulation of deceptive advertising could "relat[e] to rates" within the meaning of § 105(a) if it had a "significant impact" upon rates, *ante*, at 390, I would still dissent. The airlines' theoretical arguments have not persuaded me that the NAAG guidelines will have a significant impact upon the price of airline tickets. The airlines' argument (which the Court adopts, *ante*, at 388–390) is essentially that (1) airlines must engage in price discrimination in order to compete and operate efficiently; (2) a modest amount of misleading price advertising may facilitate that practice; (3) thus compliance with the NAAG guidelines might increase the cost of price advertising or reduce the sales generated by the advertise-

[6] Because the Court overlooks the phrase "or otherwise promulgate economic regulations" in the Senate bill, see *ante*, at 385–386, n. 2, it incorrectly assumes that the Senate bill had a narrower pre-emptive scope than the House bill.

ments; (4) as the costs increase and revenues decrease, the airlines might purchase less price advertising; and (5) a reduction in price advertising might cause a reduction in price competition, which, in turn, might result in higher airline rates. This argument is not supported by any legislative or judicial findings.

Even on the assumption that the Court's economic reasoning is sound and restrictions on price advertising could affect rates in this manner, the airlines have not sustained their burden of proving that compliance with the NAAG guidelines would have a "significant" effect on their ability to market their product and, therefore, on their rates.[7] Surely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar "significant impact" upon their rates.

For these reasons, I respectfully dissent.

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[7] They have not demonstrated, for example, that the costs of purchasing the space for the "Restrictions box" required by §2.1, or the broadcast time to state the two-sentence disclosure required by §2.2, will have a significant effect on rates. Nor can it realistically be maintained that §2.7's requirement that words such as "sale," "discount," or "reduced" may only be used if the fare is, in fact, on sale (*i. e.*, is available for a limited time and is substantially below the usual price) will hinder the airlines' ability to market and sell their low-priced fares. Finally, they surely have not proved that §2.4's requirement that fares be advertised only if sufficient seats are available to meet demand or the extent of unavailability disclosed will make it impossible for the airlines to market and sell different seats at different prices. That section expressly permits the airlines to advertise low-priced fares that are available in limited quantities; it simply requires that they include a disclaimer, such as "This fare may not be available when you call." See National Association of Attorneys General, Task Force on Air Travel Industry, Guidelines §2.4 (1988), reprinted in App. to Brief for United States as *Amicus Curiae* 24a–25a.

Syllabus

BURDICK *v.* TAKUSHI, DIRECTOR OF ELECTIONS OF HAWAII, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–535. Argued March 24, 1992—Decided June 8, 1992

Petitioner, a registered Honolulu voter, filed suit against respondent state officials, claiming that Hawaii's prohibition on write-in voting violated his rights of expression and association under the First and Fourteenth Amendments. The District Court ultimately granted his motion for summary judgment and injunctive relief, but the Court of Appeals reversed, holding that the prohibition, taken as part of the State's comprehensive election scheme, does not impermissibly burden the right to vote.

Held: Hawaii's prohibition on write-in voting does not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments. Pp. 432–442.

(a) Petitioner assumes erroneously that a law that imposes any burden on the right to vote must be subject to strict scrutiny. This Court's cases have applied a more flexible standard: A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. *Anderson* v. *Celebrezze*, 460 U. S. 780, 788–789. Under this standard, a regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to "severe" restrictions. *Norman* v. *Reed*, 502 U. S. 279, 289. If it imposes only "reasonable, nondiscriminatory restrictions" upon those rights, the State's important regulatory interests are generally sufficient to justify the restrictions. *Anderson*, *supra*, at 788. Pp. 432–434.

(b) Hawaii's write-in vote prohibition imposes a very limited burden upon voters' rights to associate politically through the vote and to have candidates of their choice placed on the ballot. Because the State's election laws provide easy access to the primary ballot until the cutoff date for the filing of nominating petitions, two months before the primary, any burden on the voters' rights is borne only by those who fail to identify their candidate of choice until shortly before the primary. An

interest in making a late rather than an early decision is entitled to little weight. Cf. *Storer* v. *Brown*, 415 U. S. 724, 736. Pp. 434–439.

(c) Hawaii's asserted interests in avoiding the possibility of unrestrained factionalism at the general election and in guarding against "party raiding" during the primaries are legitimate and are sufficient to outweigh the limited burden that the write-in voting ban imposes upon voters. Pp. 439–440.

(d) Indeed, the foregoing analysis leads to the conclusion that where, as here, a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights, a write-in voting prohibition will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme. Pp. 441–442.

937 F. 2d 415, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 442.

Arthur N. Eisenberg argued the cause for petitioner. With him on the briefs were *Steven R. Shapiro*, *John A. Powell*, *Mary Blaine Johnston*, *Carl Varady*, *Paul W. Kahn*, *Lawrence G. Sager*, *Burt Neuborne*, and *Alan B. Burdick*, *pro se*.

Steven S. Michaels, Deputy Attorney General of Hawaii, argued the cause for respondents. With him on the brief were *Warren Price III*, Attorney General, and *Girard D. Lau*, Deputy Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for Common Cause/Hawaii by *Stanley E. Levin;* for the Hawaii Libertarian Party by *Arlo Hale Smith;* and for the Socialist Workers Party by *Edward Copeland* and *Eric M. Lieberman.*

A brief of *amici curiae* urging affirmance was filed for the State of Arizona et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *Kateri Cavin*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Grant Woods* of Arizona, *Robert A. Butterworth* of Florida, *Richard P. Ieyoub* of Louisiana, *Lacy H. Thornburg* of North Carolina, *Susan Brimer Loving* of Oklahoma, *Mark*

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether Hawaii's prohibition on write-in voting unreasonably infringes upon its citizens' rights under the First and Fourteenth Amendments. Petitioner contends that the Constitution requires Hawaii to provide for the casting, tabulation, and publication of write-in votes. The Court of Appeals for the Ninth Circuit disagreed, holding that the prohibition, taken as part of the State's comprehensive election scheme, does not impermissibly burden the right to vote. 937 F. 2d 415, 422 (1991). We affirm.

I

Petitioner is a registered voter in the city and county of Honolulu. In 1986, only one candidate filed nominating papers to run for the seat representing petitioner's district in the Hawaii House of Representatives. Petitioner wrote to state officials inquiring about Hawaii's write-in voting policy and received a copy of an opinion letter issued by the Hawaii Attorney General's Office stating that the State's election law made no provision for write-in voting. 1 App. 38–39, 49.

Petitioner then filed this lawsuit, claiming that he wished to vote in the primary and general elections for a person who had not filed nominating papers and that he wished to vote in future elections for other persons whose names might not appear on the ballot. *Id.*, at 32–33. The United States District Court for the District of Hawaii concluded that the ban on write-in voting violated petitioner's First Amendment right of expression and association and entered a preliminary injunction ordering respondents to provide for the casting and tallying of write-in votes in the November 1986 general

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Barnett of South Dakota, *Paul Van Dam* of Utah, *Joseph B. Meyer* of Wyoming, and *Robert Naraja* of the Commonwealth of the Northern Mariana Islands.

James C. Linger filed a brief for Andre Marrou et al. as *amici curiae.*

election. App. to Pet. for Cert. 67a–77a. The District Court denied a stay pending appeal. 1 App. 76–107.

The Court of Appeals entered the stay, *id.*, at 109, and vacated the judgment of the District Court, reasoning that consideration of the federal constitutional question raised by petitioner was premature because "neither the plain language of Hawaii statutes nor any definitive judicial interpretation of those statutes establishes that the Hawaii legislature has enacted a ban on write-in voting," *Burdick* v. *Takushi*, 846 F. 2d 587, 588 (CA9 1988). Accordingly, the Court of Appeals ordered the District Court to abstain, see *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941), until state courts had determined whether Hawaii's election laws permitted write-in voting.[1]

On remand, the District Court certified the following three questions to the Supreme Court of Hawaii:

> "(1) Does the Constitution of the State of Hawaii require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
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> "(2) Do Hawaii's election laws require Hawaii's election officials to permit the casting of write-in votes and require Hawaii's election officials to count and publish write-in votes?
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> "(3) Do Hawaii's election laws permit, but not require, Hawaii's election officials to allow voters to cast write-in votes and to count and publish write-in votes?" App. to Pet. for Cert. 56a–57a.

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[1] While petitioner's appeal was pending, he became concerned that the Court of Appeals might not enter its decision before the September 1988 primary election. Accordingly, petitioner filed a second suit challenging the unavailability of write-in voting in the 1988 election. *Burdick* v. *Cayetano*, Civ. No. 99–0365. Coincidentally, petitioner's new suit was filed on the very day that the Ninth Circuit decided the appeal stemming from petitioner's original complaint. The two actions subsequently were consolidated by the District Court. 1 App. 142.

Hawaii's high court answered "No" to all three questions, holding that Hawaii's election laws barred write-in voting and that these measures were consistent with the State's Constitution. *Burdick* v. *Takushi*, 70 Haw. 498, 776 P. 2d 824 (1989). The United States District Court then granted petitioner's renewed motion for summary judgment and injunctive relief, but entered a stay pending appeal. 737 F. Supp. 582 (Haw. 1990).

The Court of Appeals again reversed, holding that Hawaii was not required to provide for write-in votes:

> "Although the prohibition on write-in voting places some restrictions on [petitioner's] rights of expression and association, that burden is justified in light of the ease of access to Hawaii's ballots, the alternatives available to [petitioner] for expressing his political beliefs, the State's broad powers to regulate elections, and the specific interests advanced by the State." 937 F. 2d, at 421.[2]

In so ruling, the Ninth Circuit expressly declined to follow an earlier decision regarding write-in voting by the Court of Appeals for the Fourth Circuit. See *ibid.*, citing *Dixon* v. *Maryland State Administrative Bd. of Election Laws*, 878 F. 2d 776 (CA4 1989). We granted certiorari to resolve the disagreement on this important question. 502 U. S. 1003 (1991).

II

Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.

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[2] The Ninth Circuit panel issued its opinion on March 1, 1991. See *Burdick* v. *Takushi*, 927 F. 2d 469. On June 28, 1991, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc, and the panel withdrew its original opinion and issued the version that appears at 937 F. 2d 415.

It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979). It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 193 (1986). The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, §4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973); *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208, 217 (1986). Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer* v. *Brown*, 415 U. S. 724, 730 (1974).

Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. See Brief for Petitioner 32–37. Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Bullock* v. *Carter*, 405

U. S. 134, 143 (1972); *Anderson, supra,* at 788; *McDonald* v. *Board of Election Comm'rs of Chicago,* 394 U. S. 802 (1969).

Instead, as the full Court agreed in *Anderson,* 460 U. S., at 788–789; *id.,* at 808, 817 (REHNQUIST, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.,* at 789; *Tashjian, supra,* at 213–214.

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman* v. *Reed,* 502 U. S. 279, 289 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson,* 460 U. S., at 788; see also *id.,* at 788–789, n. 9. We apply this standard in considering petitioner's challenge to Hawaii's ban on write-in ballots.

A

There is no doubt that the Hawaii election laws, like all election regulations, have an impact on the right to vote, *id.,* at 788, but it can hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot. Indeed, petitioner understandably does

not challenge the manner in which the State regulates candidate access to the ballot.

To obtain a position on the November general election ballot, a candidate must participate in Hawaii's open primary, "in which all registered voters may choose in which party primary to vote." *Tashjian, supra,* at 223, n. 11. See Haw. Rev. Stat. § 12–31 (1985). The State provides three mechanisms through which a voter's candidate-of-choice may appear on the primary ballot.

First, a party petition may be filed 150 days before the primary by any group of persons who obtain the signatures of one percent of the State's registered voters.[3] Haw. Rev. Stat. § 11–62 (Supp. 1991). Then, 60 days before the primary, candidates must file nominating papers certifying, among other things, that they will qualify for the office sought and that they are members of the party that they seek to represent in the general election. The nominating papers must contain the signatures of a specified number of registered voters: 25 for candidates for statewide or federal office; 15 for state legislative and county races. Haw. Rev. Stat. §§ 12–2.5 to 12–7 (1985 and Supp. 1991). The winner in each party advances to the general election. Thus, if a party forms around the candidacy of a single individual and no one else runs on that party ticket, the individual will be elected at the primary and win a place on the November general election ballot.

The second method through which candidates may appear on the Hawaii primary ballot is the established party route.[4]

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[3] We have previously upheld party and candidate petition signature requirements that were as burdensome or more burdensome than Hawaii's one-percent requirement. See, *e. g., Norman* v. *Reed,* 502 U. S. 279, 295 (1992); *American Party of Texas* v. *White,* 415 U. S. 767 (1974); *Jenness* v. *Fortson,* 403 U. S. 431 (1971).

[4] In *Jenness,* we rejected an equal protection challenge to a system that provided alternative means of ballot access for members of established political parties and other candidates, concluding that the system was con-

Established parties that have qualified by petition for three consecutive elections and received a specified percentage of the vote in the preceding election may avoid filing party petitions for 10 years. Haw. Rev. Stat. § 11–61 (1985). The Democratic, Republican, and Libertarian Parties currently meet Hawaii's criteria for established parties. Like new party candidates, established party contenders are required to file nominating papers 60 days before the primary. Haw. Rev. Stat. §§ 12–2.5 to 12–7 (1985 and Supp. 1991).[5]

The third mechanism by which a candidate may appear on the ballot is through the designated nonpartisan ballot. Nonpartisans may be placed on the nonpartisan primary ballot simply by filing nominating papers containing 15 to 25 signatures, depending upon the office sought, 60 days before the primary. §§ 12–3 to 12–7. To advance to the general election, a nonpartisan must receive 10 percent of the primary vote or the number of votes that was sufficient to nominate a partisan candidate, whichever number is lower. *Hustace* v. *Doi*, 60 Haw. 282, 289–290, 588 P. 2d 915, 920 (1978). During the 10 years preceding the filing of this action, 8 of 26 nonpartisans who entered the primary obtained slots on the November ballot. Brief for Respondents 8.

Although Hawaii makes no provision for write-in voting in its primary or general elections, the system outlined above provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary. Consequently, any burden on voters' freedom of choice and association is borne only by those who fail to iden-

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stitutional because it did not operate to freeze the political status quo. 403 U. S., at 438.

[5] In *Anderson v. Celebrezze*, 460 U. S. 780 (1983), the Court concluded that Ohio's early filing deadline for Presidential candidates imposed an unconstitutional burden on voters' freedom of choice and freedom of association. But *Anderson* is distinguishable because the Ohio election scheme, as explained by the Court, provided no means for a candidate to appear on the ballot after a March cutoff date. *Id.*, at 786. Hawaii fills this void through its nonpartisan primary ballot mechanism.

tify their candidate of choice until days before the primary. But in *Storer* v. *Brown*, we gave little weight to "the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status." 415 U. S., at 736.[6] Cf. *Rosario* v. *Rockefeller*, 410 U. S. 752, 757 (1973). We think the same reasoning applies here and therefore conclude that any burden imposed by Hawaii's write-in vote prohibition is a very limited one. "To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot." *Storer*, *supra*, at 736.[7]

Because he has characterized this as a voting rights rather than ballot access case, petitioner submits that the write-in prohibition deprives him of the opportunity to cast a meaningful ballot, conditions his electoral participation upon the

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[6] In *Storer*, we upheld a California ballot access law that refused to recognize independent candidates until a year after they had disaffiliated from a political party.

[7] The dissent complains that, because primary voters are required to opt for a specific partisan or nonpartisan ballot, they are foreclosed from voting in those races in which no candidate appears on their chosen ballot and in those races in which they are dissatisfied with the available choices. *Post*, at 444. But this is generally true of primaries; voters are required to select a ticket, rather than choose from the universe of candidates running on all party slates. Indeed, the Court has upheld the much more onerous requirement that voters interested in participating in a primary election enroll as a member of a political party prior to the preceding general election. *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973). Cf. *American Party of Texas*, *supra*, at 786 ("[T]he State may determine that it is essential to the integrity of the nominating [petition] process to confine voters to supporting one party and its candidates in the course of the same nominating process").

If the dissent were correct in suggesting that requiring primary voters to select a specific ballot impermissibly burdened the right to vote, it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy. *Anderson*, *supra*, at 799, n. 26; *Lubin* v. *Panish*, 415 U. S. 709, 719, n. 5 (1974).

waiver of his First Amendment right to remain free from espousing positions that he does not support, and discriminates against him based on the content of the message he seeks to convey through his vote. Brief for Petitioner 19. At bottom, he claims that he is entitled to cast and Hawaii required to count a "protest vote" for Donald Duck, Tr. of Oral Arg. 5, and that any impediment to this asserted "right" is unconstitutional.

Petitioner's argument is based on two flawed premises. First, in *Bullock* v. *Carter*, we minimized the extent to which voting rights cases are distinguishable from ballot access cases, stating that "the rights of voters and the rights of candidates do not lend themselves to neat separation." 405 U. S., at 143.[8] Second, the function of the election process is "to winnow out and finally reject all but the chosen candidates," *Storer*, 415 U. S., at 735, not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." *Ibid.* Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently. *Id.*, at 730.

Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls. See *Munro*, 479 U. S., at 199. Petitioner offers no persuasive reason to depart from these precedents. Reasonable regulation of elections *does not* require voters to espouse positions that they do not support; it *does* require them to act in a timely fashion if they wish to express their views in the voting booth. And there is nothing content based about a flat ban on all forms of write-in ballots.

The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*. Applying that standard, we conclude that, in light of the adequate ballot access afforded under Hawaii's election code, the

[8] Indeed, voters, as well as candidates, have participated in the so-called ballot access cases. *E. g.*, *Anderson*, *supra*, at 783.

State's ban on write-in voting imposes only a limited burden on voters' rights to make free choices and to associate politically through the vote.

B

We turn next to the interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting. Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate.

Hawaii's interest in "avoid[ing] the possibility of unrestrained factionalism at the general election," *Munro, supra,* at 196, provides adequate justification for its ban on write-in voting in November. The primary election is "an integral part of the entire election process," *Storer,* 415 U. S., at 735, and the State is within its rights to reserve "[t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds." *Ibid.; Munro, supra,* at 196, 199. The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies. Hawaii further promotes the two-stage, primary-general election process of winnowing out candidates, see *Storer, supra,* at 735, by permitting the unopposed victors in certain primaries to be designated officeholders. See Haw. Rev. Stat. §§ 12–41, 12–42 (1985). This focuses the attention of voters upon contested races in the general election. This would not be possible, absent the write-in voting ban.

Hawaii also asserts that its ban on write-in voting at the primary stage is necessary to guard against "party raiding." *Tashjian,* 479 U. S., at 219. Party raiding is generally defined as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson,* 460 U. S., at 789, n. 9. Petitioner suggests that, because Hawaii conducts an open primary, this is not a cognizable interest. We dis-

agree. While voters may vote on any ticket in Hawaii's primary, the State requires that party candidates be "member[s] of the party," Haw. Rev. Stat. § 12–3(a)(7) (1985), and prohibits candidates from filing "nomination papers both as a party candidate and as a nonpartisan candidate," § 12–3(c). Hawaii's system could easily be circumvented in a party primary election by mounting a write-in campaign for a person who had not filed in time or who had never intended to run for election. It could also be frustrated at the general election by permitting write-in votes for a loser in a party primary or for an independent who had failed to get sufficient votes to make the general election ballot. The State has a legitimate interest in preventing these sorts of maneuvers, and the write-in voting ban is a reasonable way of accomplishing this goal.[9]

We think these legitimate interests asserted by the State are sufficient to outweigh the limited burden that the write-in voting ban imposes upon Hawaii's voters.[10]

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[9] The State also supports its ban on write-in voting as a means of enforcing nominating requirements, combating fraud, and "fostering informed and educated expressions of the popular will." *Anderson*, 460 U. S., at 796.

[10] Although the dissent purports to agree with the standard we apply in determining whether the right to vote has been restricted, *post*, at 445–446, and implies that it is analyzing the write-in ban under some minimal level of scrutiny, *post*, at 448, the dissent actually employs strict scrutiny. This is evident from its invocation of quite rigid narrow tailoring requirements. For instance, the dissent argues that the State could adopt a less drastic means of preventing sore-loser candidacies, *ibid.*, and that the State could screen out ineligible candidates through postelection disqualification rather than a write-in voting ban. *Post*, at 450.

It seems to us that limiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable. *Anderson, supra*, at 788. The dissent's suggestion that voters are entitled to cast their ballots for unqualified candidates appears to be driven by the assumption that an election system that imposes any restraint on voter choice is unconstitutional. This is simply wrong. See *supra*, at 433–434.

III

Indeed, the foregoing leads us to conclude that when a State's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights—as do Hawaii's election laws—a prohibition on write-in voting will be presumptively valid, since any burden on the right to vote for the candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.

In such situations, the objection to the specific ban on write-in voting amounts to nothing more than the insistence that the State record, count, and publish individual protests against the election system or the choices presented on the ballot through the efforts of those who actively participate in the system. There are other means available, however, to voice such generalized dissension from the electoral process; and we discern no adequate basis for our requiring the State to provide and to finance a place on the ballot for recording protests against its constitutionally valid election laws.[11]

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. *Anderson*, *supra*, at 788; *Storer*, 415 U. S., at 730. We think that Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of

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[11] We of course in no way suggest that a State is not free to provide for write-in voting, as many States do; nor should this opinion be read to discourage such provisions.

the State's voters. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The question before us is whether Hawaii can enact a total ban on write-in voting. The majority holds that it can, finding that Hawaii's ballot access rules impose no serious limitations on the right to vote. Indeed, the majority in effect adopts a presumption that prohibitions on write-in voting are permissible if the State's ballot access laws meet constitutional standards. I dissent because I disagree with the presumption, as well as the majority's specific conclusion that Hawaii's ban on write-in voting is constitutional.

The record demonstrates the significant burden that Hawaii's write-in ban imposes on the right of voters such as petitioner to vote for the candidates of their choice. In the election that triggered this lawsuit, petitioner did not wish to vote for the one candidate who ran for state representative in his district. Because he could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote. Petitioner's dilemma is a recurring, frequent phenomenon in Hawaii because of the State's ballot access rules and the circumstance that one party, the Democratic Party, is predominant. It is critical to understand that petitioner's case is not an isolated example of a restriction on the free choice of candidates. The very ballot access rules the Court cites as mitigating his injury in fact compound it systemwide.

Democratic candidates often run unopposed, especially in state legislative races. In the 1986 general election, 33 percent of the elections for state legislative offices involved single candidate races. Reply Brief for Petitioner 2–3, n. 2. The comparable figures for 1984 and 1982 were 39 percent and 37.5 percent. *Ibid.* Large numbers of voters cast

blank ballots in uncontested races, that is, they leave the ballots blank rather than vote for the single candidate listed. In 1990, 27 percent of voters who voted in other races did not cast votes in uncontested state Senate races. Brief for Common Cause/Hawaii as *Amicus Curiae* 15–16. Twenty-nine percent of voters did not cast votes in uncontested state House races. *Id.*, at 16. Even in contested races in 1990, 12 to 13 percent of voters cast blank ballots. *Id.*, at 16–17.

Given that so many Hawaii voters are dissatisfied with the choices available to them, it is hard to avoid the conclusion that at least some voters would cast write-in votes for other candidates if given this option. The write-in ban thus prevents these voters from participating in Hawaii elections in a meaningful manner.

This evidence also belies the majority's suggestion that Hawaii voters are presented with adequate electoral choices because Hawaii makes it easy to get on the official ballot. To the contrary, Hawaii's ballot access laws taken as a whole impose a significant impediment to third-party or independent candidacies. The majority suggests that it is easy for new parties to petition for a place on the primary ballot because they must obtain the signatures of only one percent of the State's registered voters. This ignores the difficulty presented by the early deadline for gathering these signatures: 150 days (5 months) before the primary election. Meeting this deadline requires considerable organization at an early stage in the election, a condition difficult for many small parties to meet. See Brief for Socialist Workers Party as *Amicus Curiae* 10–11, n. 4.

If the party petition is unsuccessful or not completed in time, or if a candidate does not wish to be affiliated with a party, he may run as an independent. While the requirements to get on the nonpartisan ballot are not onerous (15 to 25 signatures, 60 days before the primary), the nonpartisan ballot presents voters with a difficult choice. This is because each primary voter can choose only a single ballot

for all offices. Hence, a voter who wishes to vote for an independent candidate for one office must forgo the opportunity to vote in an established party primary in every other race. Since there might be no independent candidates for most of the other offices, in practical terms the voter who wants to vote for one independent candidate forfeits the right to participate in the selection of candidates for all other offices. This rule, the very ballot access rule that the Court finds to be curative, in fact presents a substantial disincentive for voters to select the nonpartisan ballot. A voter who wishes to vote for a third-party candidate for only one particular office faces a similar disincentive to select the third party's ballot.

The dominance of the Democratic Party magnifies the disincentive because the primary election is dispositive in so many races. In effect, a Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices. This dilemma imposes a substantial burden on voter choice. It explains also why so few independent candidates secure enough primary votes to advance to the general election. As the majority notes, only eight independent candidates have succeeded in advancing to the general election in the past 10 years. That is, less than one independent candidate per year on average has in fact run in a general election in Hawaii.

The majority's approval of Hawaii's ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.

Aside from constraints related to ballot access restrictions, the write-in ban limits voter choice in another way. Write-

in voting can serve as an important safety mechanism in those instances where a late-developing issue arises or where new information is disclosed about a candidate late in the race. In these situations, voters may become disenchanted with the available candidates when it is too late for other candidates to come forward and qualify for the ballot. The prohibition on write-in voting imposes a significant burden on voters, forcing them either to vote for a candidate whom they no longer support or to cast a blank ballot. Write-in voting provides a way out of the quandary, allowing voters to switch their support to candidates who are not on the official ballot. Even if there are other mechanisms to address the problem of late-breaking election developments (unsuitable candidates who win an election can be recalled), allowing write-in voting is the only way to preserve the voters' right to cast a meaningful vote in the general election.

With this background, I turn to the legal principles that control this case. At the outset, I agree with the first premise in the majority's legal analysis. The right at stake here is the right to cast a meaningful vote for the candidate of one's choice. Petitioner's right to freedom of expression is not implicated. His argument that the First Amendment confers upon citizens the right to cast a protest vote and to have government officials count and report this vote is not persuasive. As the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression.

I agree as well with the careful statement the Court gives of the test to be applied in this case to determine if the right to vote has been constricted. As the Court phrases it, we must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it neces-

sary to burden the plaintiff's rights.'" *Ante*, at 434, quoting *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208, 213–214 (1986). I submit the conclusion must be that the write-in ban deprives some voters of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.

As a starting point, it is useful to remember that until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888. See L. E. Fredman, The Australian Ballot: The Story of an American Reform ix (1968). Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties. Since there were no state-imposed restrictions on whose name could appear on a ballot, individuals could always vote for the candidates of their choice.

State-prepared ballots were considered to be a progressive reform to reduce fraudulent election practices. The preprinted ballots offered by political parties had often been in distinctive colors so that the party could determine whether one who had sold his vote had used the right ballot. *Id.*, at 22. The disadvantage of the new ballot system was that it could operate to constrict voter choice. In recognition of this problem, several early state courts recognized a right to cast write-in votes. See, *e. g.*, *Sanner* v. *Patton*, 155 Ill. 553, 562–564, 40 N. E. 290, 292–293 (1895) ("[I]f the construction contended for by appellee [prohibiting write-in voting] be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and where this right is taken away there is nothing left worthy of the name of the right of suffrage—the boasted free ballot becomes a delusion"); *Patterson* v. *Hanley*, 136 Cal. 265, 270, 68 P. 821, 823 (1902) ("Under every form of ballot of which we have had any experience the voter has been allowed—and it seems to be agreed that he must be allowed—the privilege of casting his vote for any person for

any office by writing his name in the proper place"); and *Oughton* v. *Black*, 212 Pa. 1, 6–7, 61 A. 346, 348 (1905) ("Unless there was such provision to enable the voter, not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way").

As these courts recognized, some voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government"). For those who are affected by write-in bans, the infringement on their right to vote for the candidate of their choice is total. The fact that write-in candidates are longshots more often than not makes no difference; the right to vote for one's preferred candidate exists regardless of the likelihood that the candidate will be successful. *Socialist Labor Party* v. *Rhodes*, 290 F. Supp. 983, 987 (SD Ohio) ("A write-in ballot permits a voter to effectively exercise his individual constitutionally protected franchise. The use of write-in ballots does not and should not be dependent on the candidate's chance of success"), aff'd in part, modified in part *sub nom. Williams* v. *Rhodes*, 393 U. S. 23 (1968).

Based on the foregoing reasoning, I cannot accept the majority's presumption that write-in bans are permissible if the State's ballot access laws are otherwise constitutional. The presumption is circular, for it fails to take into account that we must consider the availability of write-in voting, or the lack thereof, as a factor in determining whether a State's ballot access laws considered as a whole are constitutional.

Jenness v. *Fortson*, 403 U. S. 431, 438 (1971); *Storer* v. *Brown*, 415 U. S. 724, 736, n. 7 (1974). The effect of the presumption, moreover, is to excuse a State from having to justify or defend any write-in ban. Under the majority's view, a write-in ban only has constitutional implications when the State's ballot access scheme is defective and write-in voting would remedy the defect. This means that the State needs to defend only its ballot access laws, and not the write-in restriction itself.

The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon some individual voters by preventing them from exercising their right to vote in a meaningful manner. The liberality of a State's ballot access laws is one determinant of the extent of the burden imposed by the write-in ban; it is not, though, an automatic excuse for forbidding all write-in voting. In my view, a State that bans write-in voting in some or all elections must justify the burden on individual voters by putting forth the precise interests that are served by the ban. A write-in prohibition should not be presumed valid in the absence of any proffered justification by the State. The standard the Court derives from *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983), means at least this.

Because Hawaii's write-in ban, when considered in conjunction with the State's ballot access laws, imposes a significant burden on voters such as petitioner, it must put forward the state interests which justify the burden so that we can assess them. I do not think it necessary here to specify the level of scrutiny that should then be applied because, in my view, the State has failed to justify the write-in ban under any level of scrutiny. The interests proffered by the State, some of which are puzzling, are not advanced to any significant degree by the write-in prohibition. I consider each of the interests in turn.

The interest that has the best potential for acceptance, in my view, is that of preserving the integrity of party pri-

maries by preventing sore loser candidacies during the general election. As the majority points out, we have acknowledged the State's interest in avoiding party factionalism. A write-in ban does serve this interest to some degree by eliminating one mechanism which could be used by sore loser candidates. But I do not agree that this interest provides "adequate justification" for the ban. *Ante*, at 439. As an initial matter, the interest can at best justify the write-in prohibition for general elections; it cannot justify Hawaii's complete ban in both the primary and the general election. And with respect to general elections, a write-in ban is a very overinclusive means of addressing the problem; it bars legitimate candidacies as well as undesirable sore loser candidacies. If the State desires to prevent sore loser candidacies, it can implement a narrow provision aimed at that particular problem.

The second interest advanced by the State is enforcing its policy of permitting the unopposed victors in certain primaries to be designated as officeholders without having to go through the general election. The majority states that "[t]his would not be possible, absent the write-in voting ban." *Ibid.* This makes no sense. As petitioner's counsel acknowledged during oral argument, "[t]o the degree that Hawaii has abolished general elections in these circumstances, there is no occasion to cast a write-in ballot." Tr. of Oral Arg. 14. If anything, the argument cuts the other way because this provision makes it all the more important to allow write-in voting in the primary elections because primaries are often dispositive.

Hawaii justifies its write-in ban in primary elections as a way to prevent party raiding. Petitioner argues that this alleged interest is suspect because the State created the party raiding problem in the first place by allowing open primaries. I agree. It is ironic for the State to raise this concern when the risk of party raiding is a feature of the open primary system the State has chosen. The majority

suggests that write-in voting presents a particular risk of circumventing the primary system because state law requires candidates in party primaries to be members of the party. Again, the majority's argument is not persuasive. If write-in voters mount a campaign for a candidate who does not meet state-law requirements, the candidate would be disqualified from the election.

The State also cites its interest in promoting the informed selection of candidates, an interest it claims is advanced by "flushing candidates into the open a reasonable time before the election." Brief for Respondents 44. I think the State has it backwards. The fact that write-in candidates often do not conduct visible campaigns seems to me to make it more likely that voters who go to the trouble of seeking out these candidates and writing in their names are well informed. The state interest may well cut the other way.

The State cites interests in combating fraud and enforcing nomination requirements. But the State does not explain how write-in voting presents a risk of fraud in today's polling places. As to the State's interest in making sure that ineligible candidates are not elected, petitioner's counsel pointed out at argument that approximately 20 States require write-in candidates to file a declaration of candidacy and verify that they are eligible to hold office a few days before the election. Tr. of Oral Arg. 13.

In sum, the State's proffered justifications for the write-in prohibition are not sufficient under any standard to justify the significant impairment of the constitutional rights of voters such as petitioner. I would grant him relief.

Syllabus

EASTMAN KODAK CO. *v.* IMAGE TECHNICAL SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–1029. Argued December 10, 1991—Decided June 8, 1992

After respondent independent service organizations (ISO's) began servicing copying and micrographic equipment manufactured by petitioner Eastman Kodak Co., Kodak adopted policies to limit the availability to ISO's of replacement parts for its equipment and to make it more difficult for ISO's to compete with it in servicing such equipment. Respondents then filed this action, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for its machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service and parts for such machines, in violation of § 2 of that Act. The District Court granted summary judgment for Kodak, but the Court of Appeals reversed. Among other things, the appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets, and rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market.

Held:

1. Kodak has not met the requirements of Federal Rule of Civil Procedure 56(c) for an award of summary judgment on the § 1 claim. Pp. 461–479.

(a) A tying arrangement—*i. e.*, an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier—violates § 1 only if the seller has appreciable economic power in the tying product market. Pp. 461–462.

(b) Respondents have presented sufficient evidence of a tying arrangement to defeat a summary judgment motion. A reasonable trier of fact could find, first, that service and parts are two distinct products in light of evidence indicating that each has been, and continues in some circumstances to be, sold separately, and, second, that Kodak has tied the sale of the two products in light of evidence indicating that it would sell parts to third parties only if they agreed not to buy service from ISO's. Pp. 462–463.

(c) For purposes of determining appreciable economic power in the tying market, this Court's precedents have defined market power as the power to force a purchaser to do something that he would not do in a competitive market, and have ordinarily inferred the existence of such power from the seller's possession of a predominant share of the market. P. 464.

(d) Respondents would be entitled under such precedents to a trial on their claim that Kodak has sufficient power in the parts market to force unwanted purchases of the tied service market, based on evidence indicating that Kodak has control over the availability of parts and that such control has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Pp. 464–465.

(e) Kodak has not satisfied its substantial burden of showing that, despite such evidence, an inference of market power is unreasonable. Kodak's theory that its lack of market power in the primary equipment market precludes—as a matter of law—the possibility of market power in the derivative aftermarkets rests on the factual assumption that if it raised its parts or service prices above competitive levels, potential customers would simply stop buying its equipment. Kodak's theory does not accurately describe actual market behavior, since there is no evidence or assertion that its equipment sales dropped after it raised its service prices. Respondents offer a forceful reason for this discrepancy: the existence of significant information and switching costs that could create a less responsive connection between aftermarket prices and equipment sales. It is plausible to infer from respondents' evidence that Kodak chose to gain immediate profits by exerting market power where locked-in customers, high information costs, and discriminatory pricing limited, and perhaps eliminated, any long-term loss. Pp. 465–478.

(f) Nor is this Court persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because there is a significant risk of deterring procompetitive conduct. Because Kodak's service and parts policy is not one that appears always, or almost always, to enhance competition, the balance tips against summary judgment. Pp. 478–479.

2. Respondents have presented genuine issues for trial as to whether Kodak has monopolized, or attempted to monopolize, the service and parts markets in violation of § 2. Pp. 480–486.

(a) Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is sufficient to survive summary judgment on the first element of the monopoly offense, the possession of monopoly power. Kodak's contention that, as a matter of law, a single brand of a product

Syllabus

or service can never be a relevant market contravenes cases of this Court indicating that one brand of a product can constitute a separate market in some instances. The proper market definition in this case can be determined only after a factual inquiry into the commercial realities faced by Kodak equipment owners. Pp. 481–482.

(b) As to the second element of a § 2 claim, the willful use of monopoly power, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the service market. Thus, liability turns on whether valid business reasons can explain Kodak's actions. However, none of its asserted business justifications—a commitment to quality service, a need to control inventory costs, and a desire to prevent ISO's from free-riding on its capital investment—are sufficient to prove that it is entitled to a judgment as a matter of law. Pp. 482–486.

903 F. 2d 612, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 486.

Donn P. Pickett argued the cause for petitioner. With him on the briefs were *Daniel M. Wall, Alfred C. Pfeiffer, Jr.*, and *Jonathan W. Romeyn.*

Assistant Attorney General Rill argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Wallace, Christopher J. Wright, Catherine G. O'Sullivan*, and *Robert B. Nicholson.*

James A. Hennefer argued the cause for respondents. With him on the brief were *A. Kirk McKenzie, Douglas E. Rosenthal, Jonathan M. Jacobson*, and *Elinor R. Hoffmann.**

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*Briefs of *amici curiae* urging reversal were filed for the Computer and Business Equipment Manufacturers Association by *Simon Lazarus III;* for Digital Equipment Corp. et al. by *Kurt W. Melchior, Robert A. Skitol, James A. Meyers, Marcia Howe Adams, Ivor Cary Armistead III, Ronald A. Stern, Stephen Wasinger, James W. Olson, Carter G. Phillips, Ralph I. Miller*, and *Florinda J. Iascone;* for the Motor Vehicle Manufacturers Association of the United States, Inc., by *Thomas B. Leary, William H.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This is yet another case that concerns the standard for summary judgment in an antitrust controversy. The

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Crabtree, and *Charles H. Lockwood II*; and for the National Electrical Manufacturers Association by *James S. Dittmar* and *James L. Messenger*.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *Simon Karas*, and *Elizabeth H. Watts* and *Marc B. Bandman*, Assistant Attorneys General, *James H. Evans*, Attorney General of Alabama, and *Marc Givhan*, Assistant Attorney General, *Charles E. Cole*, Attorney General of Alaska, and *James Forbes*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, and *Jeri K. Auther*, Assistant Attorney General, *Winston Bryant*, Attorney General of Arkansas, and *Royce Griffin*, Deputy Attorney General, *Daniel E. Lungren*, Attorney General of California, *Roderick E. Walston*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, and *Kathleen E. Foote*, Deputy Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, and *Robert M. Langer*, Assistant Attorney General, *Robert A. Butterworth*, Attorney General of Florida, and *Jerome W. Hoffman*, Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, *Robert A. Marks*, Supervising Deputy Attorney General, and *Ted Clause*, Deputy Attorney General, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Rosalyn Kaplan*, Solicitor General, and *Christine Rosso*, Senior Assistant Attorney General, *Bonnie J. Campbell*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Robert T. Stephan*, Attorney General of Kansas, and *Mary Ann Heckman*, Assistant Attorney General, *Frederic J. Cowan*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Anne F. Benoit*, Assistant Attorney General, *Michael E. Carpenter*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Robert N. McDonald* and *Ellen S. Cooper*, Assistant Attorneys General, *Scott Harshbarger*, Attorney General of Massachusetts, and *George K. Weber*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Thomas F. Pursell*, Deputy Attorney General, and *James P. Spencer* and *Susan C. Gretz*, Special Assistant Attorneys General, *Frankie Sue Del Pappa*, Attorney General of Nevada, and *Rob Kirkman*, Deputy Attorney General, *Robert J. Del Tufo*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solici-

principal issue here is whether a defendant's lack of market power in the primary equipment market precludes—as a matter of law—the possibility of market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. Respondents are 18 independent service organizations (ISO's) that in the early 1980's began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability of parts to ISO's and to make it more difficult for ISO's to compete with Kodak in servicing Kodak equipment.

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tor General, and *George W. Sampson*, Assistant Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Mark Tobey*, Assistant Attorney General, *R. Paul Van Dam*, Attorney General of Utah, and *Arthur M. Strong*, Assistant Attorney General, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Geoff Yudien*, Assistant Attorney General, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Carol A. Smith*, Assistant Attorney General, and *Mario J. Palumbo*, Attorney General of West Virginia, and *Donna S. Quesenberry*, Assistant Attorney General; for the Automotive Warehouse Distributors Association et al. by *Donald A. Randall*, *Louis R. Marchese*, *Robert J. Verdisco*, and *Basil J. Mezines;* for Bell Atlantic Business Systems Services, Inc., by *Richard G. Taranto*, *Joel I. Klein*, and *John M. Kelleher;* for Grumman Corporation by *Patrick O. Killian;* for the National Association of State Purchasing Officials et al. by *Richard D. Monkman;* for the National Office Machine Dealers Association et al. by *Mark P. Cohen;* for the National Retail Federation by *Michael J. Altier;* for Public Citizen by *Alan B. Morrison;* for State Farm Mutual Automobile Insurance Co. et al. by *Melvin Spaeth*, *James F. Fitzpatrick*, and *Melvin C. Garbow.*

Briefs of *amici curiae* were filed for the California State Electronics Association et al. by *Richard I. Fine;* for Computer Service Network International by *Ronald S. Katz;* and for the National Electronics Sales and Service Dealers Association by *Ronald S. Katz.*

Respondents instituted this action in the United States District Court for the Northern District of California, alleging that Kodak's policies were unlawful under both § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2 (1988 ed., Supp. II). After truncated discovery, the District Court granted summary judgment for Kodak. The Court of Appeals for the Ninth Circuit reversed. The appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets. It rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market. Because of the importance of the issue, we granted certiorari. 501 U. S. 1216 (1991).

I

A

Because this case comes to us on petitioner Kodak's motion for summary judgment, "[t]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 587 (1986). Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims. See *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 339 (1982).

Kodak manufactures and sells complex business machines—as relevant here, high-volume photocopiers and micrographic equipment.[1] Kodak equipment is unique; micro-

[1] Kodak's micrographic equipment includes four different product areas. The first is capture products such as microfilmers and electronic scanners, which compact an image and capture it on microfilm. The second is equipment such as microfilm viewers and viewer/printers. This equipment is used to retrieve the images. The third is Computer Output Microform (COM) recorders, which are data-processing peripherals that record

graphic software programs that operate on Kodak machines, for example, are not compatible with competitors' machines. See App. 424–425, 487–489, 537. Kodak parts are not compatible with other manufacturers' equipment, and vice versa. See *id.*, at 432, 413–415. Kodak equipment, although expensive when new, has little resale value. See *id.*, at 358–359, 424–425, 427–428, 467, 505–506, 519–521.

Kodak provides service and parts for its machines to its customers. It produces some of the parts itself; the rest are made to order for Kodak by independent original-equipment manufacturers (OEM's). See *id.*, at 429, 465, 490, 496. Kodak does not sell a complete system of original equipment, lifetime service, and lifetime parts for a single price. Instead, Kodak provides service after the initial warranty period either through annual service contracts, which include all necessary parts, or on a per-call basis. See *id.*, at 98–99; Brief for Petitioner 3. It charges, through negotiations and bidding, different prices for equipment, service, and parts for different customers. See App. 420–421, 536. Kodak provides 80% to 95% of the service for Kodak machines. See *id.*, at 430.

Beginning in the early 1980's, ISO's began repairing and servicing Kodak equipment. They also sold parts and reconditioned and sold used Kodak equipment. Their customers were federal, state, and local government agencies, banks, insurance companies, industrial enterprises, and providers of specialized copy and microfilming services. See *id.*, at 417, 419–421, 492–493, 499, 516, 539. ISO's provide service at a price substantially lower than Kodak does. See *id.*, at 414, 451, 453–454, 469, 474–475, 488, 493, 536–537; Lodging 133. Some customers found that the ISO service was of higher quality. See App. 425–426, 537–538.

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computer-generated data onto microfilm. The fourth is Computer Assisted Retrieval (CAR) systems, which utilize computers to locate and retrieve micrographic images. See App. 156–158.

Some ISO customers purchase their own parts and hire ISO's only for service. See Lodging 144–147. Others choose ISO's to supply both service and parts. See *id.*, at 133. ISO's keep an inventory of parts, purchased from Kodak or other sources, primarily the OEM's.[2] See App. 99, 415–416, 490.

In 1985 and 1986, Kodak implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines. See Brief for Petitioner 6; App. 91–92, 98–100, 140–141, 171–172, 190, 442–447, 455–456, 483–484.

As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts. Kodak and the OEM's agreed that the OEM's would not sell parts that fit Kodak equipment to anyone other than Kodak. See *id.*, at 417, 428–429, 447, 468, 474, 496. Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's. See *id.*, at 419–420, 428–429, 483–484, 517–518, 589–590. In addition, Kodak took steps to restrict the availability of used machines. See *id.*, at 427–428, 465–466, 510–511, 520.

Kodak intended, through these policies, to make it more difficult for ISO's to sell service for Kodak machines. See *id.*, at 106–107, 171, 516. It succeeded. ISO's were unable to obtain parts from reliable sources, see *id.*, at 429, 468, 496, and many were forced out of business, while others lost substantial revenue. See *id.*, at 422, 458–459, 464, 468, 475–477, 482–484, 495–496, 501, 521. Customers were forced to switch to Kodak service even though they preferred ISO service. See *id.*, at 420–422.

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[2] In addition to the OEM's, other sources of Kodak parts include (1) brokers who would buy parts from Kodak, or strip used Kodak equipment to obtain the useful parts and resell them, (2) customers who buy parts from Kodak and make them available to ISO's, and (3) used equipment to be stripped for parts. See *id.*, at 419, 517; Brief for Petitioner 38.

B

In 1987, the ISO's filed the present action in the District Court, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of § 2 of that Act.[3]

Kodak filed a motion for summary judgment before respondents had initiated discovery. The District Court permitted respondents to file one set of interrogatories and one set of requests for production of documents and to take six depositions. Without a hearing, the District Court granted summary judgment in favor of Kodak. App. to Pet. for Cert. 29B.

As to the § 1 claim, the court found that respondents had provided no evidence of a tying arrangement between Kodak equipment and service or parts. See *id.*, at 32B–33B. The court, however, did not address respondents' § 1 claim that is at issue here. Respondents allege a tying arrangement not between Kodak *equipment* and service, but between Kodak *parts* and service. As to the § 2 claim, the District Court concluded that although Kodak had a "natural monopoly over the market for parts it sells under its name," a unilateral refusal to sell those parts to ISO's did not violate § 2.

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[3] Section 1 of the Sherman Act states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1 (1988 ed., Supp. II).

Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U. S. C. § 2 (1988 ed., Supp. II).

The Court of Appeals for the Ninth Circuit, by a divided vote, reversed. 903 F. 2d 612 (1990). With respect to the § 1 claim, the court first found that whether service and parts were distinct markets and whether a tying arrangement existed between them were disputed issues of fact. *Id.*, at 615–616. Having found that a tying arrangement might exist, the Court of Appeals considered a question not decided by the District Court: Was there "an issue of material fact as to whether Kodak has sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]." *Id.*, at 616. The court agreed with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refused to uphold the District Court's grant of summary judgment "on this theoretical basis" because "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id.*, at 617. Noting that the District Court had not considered the market power issue, and that the record was not fully developed through discovery, the court declined to require respondents to conduct market analysis or to pinpoint specific imperfections in order to withstand summary judgment.[4] "It is enough that [respondents] have presented evidence of actual events from which a reasonable trier of fact could conclude that . . . competition in the [equipment] market does not, in reality, curb Kodak's power in the parts market." *Ibid.*

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[4] Specifically, the Court of Appeals explained that the District Court had denied the request for further discovery made by respondents in their opposition to Kodak's summary judgment motion: "For example, [respondents] requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request." 903 F. 2d, at 617, n. 4.

The court then considered the three business justifications Kodak proffered for its restrictive parts policy: (1) to guard against inadequate service, (2) to lower inventory costs, and (3) to prevent ISO's from free-riding on Kodak's investment in the copier and micrographic industry. The court concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. *Id.*, at 618–619. The court also found Kodak's third justification, preventing ISO's from profiting on Kodak's investments in the equipment markets, legally insufficient. *Id.*, at 619.

As to the §2 claim, the Court of Appeals concluded that sufficient evidence existed to support a finding that Kodak's implementation of its parts policy was "anticompetitive" and "exclusionary" and "involved a specific intent to monopolize." *Id.*, at 620. It held that the ISO's had come forward with sufficient evidence, for summary judgment purposes, to disprove Kodak's business justifications. *Ibid.*

The dissent in the Court of Appeals, with respect to the §1 claim, accepted Kodak's argument that evidence of competition in the equipment market "*necessarily* precludes power in the derivative market." *Id.*, at 622 (emphasis in original). With respect to the §2 monopolization claim, the dissent concluded that, entirely apart from market power considerations, Kodak was entitled to summary judgment on the basis of its first business justification because it had "submitted extensive and undisputed evidence of a marketing strategy based on high-quality service." *Id.*, at 623.

II

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5–6

(1958). Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 503 (1969).

Kodak did not dispute that its arrangement affects a substantial volume of interstate commerce. It, however, did challenge whether its activities constituted a "tying arrangement" and whether Kodak exercised "appreciable economic power" in the tying market. We consider these issues in turn.

A

For respondents to defeat a motion for summary judgment on their claim of a tying arrangement, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.

For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts. *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 21–22 (1984). Evidence in the record indicates that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners.[5] Indeed, the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service.[6]

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[5] The Court of Appeals found: "Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service." *Id.*, at 616.

[6] *Amicus* briefs filed by various service organizations attest to the magnitude of the service business. See, *e. g.*, Brief for Computer Service Network International as *Amicus Curiae;* Brief for National Electronics Sales and Service Dealers Association as *Amicus Curiae;* Brief for Cali-

Kodak insists that because there is no demand for parts separate from service, there cannot be separate markets for service and parts. Brief for Petitioner 15, n. 3. By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Jefferson Parish*, 466 U. S., at 19, n. 30.

Kodak's assertion also appears to be incorrect as a factual matter. At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service.[7] Enough doubt is cast on Kodak's claim of a unified market that it should be resolved by the trier of fact.

Finally, respondents have presented sufficient evidence of a tie between service and parts. The record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISO's.[8]

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fornia State Electronics Association et al. as *Amici Curiae;* Brief for National Office Machine Dealers et al. as *Amici Curiae.*

[7] The dissent suggests that parts and service are not separate products for tying purposes because all service may involve installation of parts. *Post*, at 494–495, n. 2. Because the record does not support this factual assertion, under the approach of both the Court and the concurrence in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2 (1984), Kodak is not entitled to summary judgment on whether parts and service are distinct markets.

[8] In a footnote, Kodak contends that this practice is only a unilateral refusal to deal, which does not violate the antitrust laws. See Brief for Petitioner 15, n. 4. Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not. See 903 F. 2d, at 619.

B

Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish*, 466 U. S., at 14.[9] It has been defined as "the ability of a single seller to raise price and restrict output." *Fortner*, 394 U. S., at 503; *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Jefferson Parish*, 466 U. S., at 17; *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571 (1966); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611–613 (1953).

1

Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases of the tied market, service. Respondents provide evidence that certain parts are available exclusively through Kodak. Respondents also assert that Kodak has control over the availability of parts it does not manufacture. According to respondents' evidence, Kodak has prohibited independent manufacturers from selling Kodak parts to ISO's, pressured Kodak equipment owners and independent parts distributors to deny ISO's the purchase of Kodak parts, and taken steps to restrict the availability of used machines.

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[9] "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish*, 466 U. S., at 12.

Respondents also allege that Kodak's control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISO's were driven out of business by Kodak's policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.

2

Kodak counters that even if it concedes monopoly *share* of the relevant parts market, it cannot actually exercise the necessary market *power* for a Sherman Act violation. This is so, according to Kodak, because competition exists in the equipment market.[10] Kodak argues that it could not have

[10] In their brief and at oral argument, respondents argued that Kodak's market share figures for high-volume copy machines, CAR systems, and micrographic-capture equipment demonstrate Kodak's market power in the equipment market. Brief for Respondents 16–18, 32–33; Tr. of Oral Arg. 28–31.

In the Court of Appeals, however, respondents did not contest Kodak's assertion that its market shares indicated a competitive equipment market. The Court of Appeals believed that respondents "do not dispute Kodak's assertion that it lacks market power in the [equipment] markets." 903 F. 2d, at 616, n. 3. Nor did respondents question Kodak's asserted lack of market power in their brief in opposition to the petition for certiorari, although they acknowledged that Kodak's entire case rested on its understanding that respondents were not disputing the existence of competition in the equipment market. Brief in Opposition 8.

Recognizing that on summary judgment we may examine the record *de novo* without relying on the lower courts' understanding, *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962), respondents now ask us to decline to reach the merits of the questions presented in the petition, and instead to affirm the Ninth Circuit's judgment based on the factual dispute over market power in the equipment market. We decline respondents' invitation. We stated in *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985): "Our decision to grant certiorari represents a commitment of scarce judi-

the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

Kodak does not present any actual data on the equipment, service, or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." Brief for Petitioner 33. Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any material fact" on the market power issue.[11] See Fed. Rule Civ. Proc. 56(c).

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored

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cial resources with a view to deciding the merits of one or more of the questions presented in the petition." Because respondents failed to bring their objections to the premise underlying the questions presented to our attention in their opposition to the petition for certiorari, we decide those questions based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market.

[11] Kodak argues that such a rule would be *per se*, with no opportunity for respondents to rebut the conclusion that market power is lacking in the parts market. See Brief for Petitioner 30–31 ("There is nothing that respondents could prove that would overcome Kodak's conceded lack of market power"); *id.*, at 30 (discovery is "pointless" once the "dispositive fact" of lack of market power in the equipment market is conceded); *id.*, at 22 (Kodak's lack of market power in the equipment market "dooms any attempt to extract monopoly profits" even in an allegedly imperfect market); *id.*, at 25 (it is "impossible" for Kodak to make more total profit by overcharging its existing customers for service).

As an apparent second-best alternative, Kodak suggests elsewhere in its brief that the rule would permit a defendant to meet its summary judgment burden under Federal Rule of Civil Procedure 56(c); the burden would then shift to the plaintiffs to "prove . . . that there is specific reason to believe that normal economic reasoning does not apply." Brief for Petitioner 30. This is the United States' position. See Brief for United States as *Amicus Curiae* 10–11.

in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record." *Maple Flooring Manufacturers Assn.* v. *United States*, 268 U. S. 563, 579 (1925); *Du Pont*, 351 U. S., at 395, n. 22; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 70 (1977) (WHITE, J., concurring in judgment).[12] In determining the existence of market power, and specifically the "responsiveness of the sales of one product to price changes of the other," *Du Pont*, 351 U. S., at 400; see also *id.*, at 394–395, and 400–401, this Court has examined closely the economic reality of the market at issue.[13]

Kodak contends that there is no need to examine the facts when the issue is market power in the aftermarkets. A legal presumption against a finding of market power is warranted in this situation, according to Kodak, because the existence of market power in the service and parts markets absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive behavior. *Matsushita*, 475 U. S., at 587; *id.*, at 594–595.

Kodak analogizes this case to *Matsushita*, where a group of American corporations that manufactured or sold consumer electronic products alleged that their 21 Japanese counterparts were engaging in a 20-year conspiracy to price

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[12] See generally *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 723–726 (1988); *FTC* v. *Indiana Federation of Dentists*, 476 U. S. 447, 458–459 (1986); *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 100–104 (1984); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S., at 59.

[13] See, *e. g.*, *Jefferson Parish*, 466 U. S., at 26–29; *United States* v. *Connecticut National Bank*, 418 U. S. 656, 661–666 (1974); *United States* v. *Grinnell Corp.*, 384 U. S. 563, 571–576 (1966); *International Boxing Club of New York, Inc.* v. *United States*, 358 U. S. 242, 250–251 (1959); see also *Jefferson Parish*, 466 U. S., at 37, n. 6 (O'CONNOR, J., concurring) (citing cases and describing the careful consideration the Court gives to the particular facts when determining market power).

below cost in the United States in the hope of expanding their market share sometime in the future. After several years of detailed discovery, the defendants moved for summary judgment. *Id.*, at 577–582. Because the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an "absence of any rational motive to conspire." *Id.*, at 597. In that context, the Court determined that the plaintiffs' theory of predatory pricing made no practical sense, was "speculative," and was not "reasonable." *Id.*, at 588, 590, 593, 595, 597. Accordingly, the Court held that a reasonable jury could not return a verdict for the plaintiffs and that summary judgment would be appropriate against them unless they came forward with more persuasive evidence to support their theory. *Id.*, at 587–588, 595–598.

The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.[14] If the plaintiff's theory is eco-

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[14] See, *e. g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986) ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 768 (1984) (to survive summary judgment there must be evidence that "reasonably tends to prove" plaintiff's theory); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, 288–289 (1968) (defendant meets his burden under Rule 56(c) when he "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them"); *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359, 375 (1927). See also *H. L. Hayden*

nomically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable. To determine whether Kodak has met that burden, we must unravel the factual assumptions underlying its proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets.

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, *i. e.*, the "cross-elasticity of demand." See *Du Pont*, 351 U. S., at 400; P. Areeda & L. Kaplow, Antitrust Analysis ¶ 342(c) (4th ed. 1988).[15] Ko-

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Co. of New York, Inc. v. *Siemens Medical Systems, Inc.*, 879 F. 2d 1005, 1012 (CA2 1989) ("[O]nly *reasonable* inferences can be drawn from the evidence in favor of the nonmoving party") (emphasis in original); *Arnold Pontiac-GMC, Inc.* v. *Budd Baer, Inc.*, 826 F. 2d 1335, 1339 (CA3 1987) (*Matsushita* directs us "'to consider whether the inference of conspiracy is reasonable'"); *Instructional Systems Development Corp.* v. *Aetna Casualty & Surety Co.*, 817 F. 2d 639, 646 (CA10 1987) (summary judgment not appropriate under *Matsushita* when defendants "could reasonably have been economically motivated").

[15] What constrains the defendant's ability to raise prices in the service market is "the elasticity of demand faced by the defendant—the degree to which its sales fall . . . as its price rises." Areeda & Kaplow ¶ 342(c), p. 576.

Courts usually have considered the relationship between price in one market and demand in another in defining the relevant market. Because market power is often inferred from market share, market definition generally determines the result of the case. Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1806–1813 (1990). Kodak chose to focus on market power directly rather than arguing that the relationship between equipment and service and parts is such that the three should be included in the same market definition. Whether considered in the conceptual category of "market definition" or "market power," the ultimate inquiry is the same—whether competition

dak's proposed rule rests on a factual assumption about the cross-elasticity of demand in the equipment and aftermarkets: "If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests."[16] Brief for Petitioner 12. Kodak argues that the Court should accept, as a matter of law, this "basic economic realit[y]," *id.*, at 24, that competition in the equipment market necessarily prevents market power in the aftermarkets.[17]

Even if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets. The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales. Areeda & Kaplow ¶¶ 112 and 340(a). Kodak's claim that charging more for service and parts would be "a short-run game," Brief for Petitioner 26, is based on the false dichotomy that there are only two prices

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in the equipment market will significantly restrain power in the service and parts markets.

[16] The United States as *amicus curiae* in support of Kodak echoes this argument: "The ISOs' claims are implausible because Kodak lacks market power in the markets for its copier and micrographic equipment. Buyers of such equipment regard an increase in the price of parts or service as an increase in the price of the equipment, and sellers recognize that the revenues from sales of parts and service are attributable to sales of the equipment. In such circumstances, it is not apparent how an equipment manufacturer such as Kodak could exercise power in the aftermarkets for parts and service." Brief for United States as *Amicus Curiae* 8.

[17] It is clearly true, as the United States claims, that Kodak "cannot set service or parts prices without regard to the impact on the market for equipment." *Id.*, at 20. The fact that the cross-elasticity of demand is not zero proves nothing; the disputed issue is how much of an impact an increase in parts and service prices has on equipment sales and on Kodak's profits.

that can be charged—a competitive price or a ruinous one. But there could easily be a middle, optimum price at which the increased revenues from the higher priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales. The fact that the equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of power in those markets. See Areeda & Kaplow ¶ 340(b) ("[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power") (emphasis in original). Thus, contrary to Kodak's assertion, there is no immutable physical law—no "basic economic reality"—insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

We next consider the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that respondents' assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable?[18] Cf. *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986).

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[18] Although Kodak repeatedly relies on *Continental T. V.* as support for its factual assertion that the equipment market will prevent exploitation of the service and parts markets, the case is inapposite. In *Continental T. V.*, the Court found that a manufacturer's policy restricting the number of retailers that were permitted to sell its product could have a procompetitive effect. See 433 U. S., at 55. The Court also noted that any negative effect of exploitation of the intrabrand market (the competition between retailers of the same product) would be checked by competition in the interbrand market (competition over the same generic product) because consumers would substitute a different brand of the same product. Unlike *Continental T. V.*, this case does not concern vertical relationships between parties on different levels of the same distribution chain. In the relevant market, service, Kodak and the ISO's are direct competitors; their relationship is horizontal. The interbrand competition at issue here is competition over the provision of service. Despite petitioner's best effort,

To review Kodak's theory, it contends that higher service prices will lead to a disastrous drop in equipment sales. Presumably, the theory's corollary is to the effect that low service prices lead to a dramatic increase in equipment sales. According to the theory, one would have expected Kodak to take advantage of lower priced ISO service as an opportunity to expand equipment sales. Instead, Kodak adopted a restrictive sales policy consciously designed to eliminate the lower priced ISO service, an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory. Yet, according to the record, it has done neither. Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.

Kodak and the United States attempt to reconcile Kodak's theory with the contrary actual results by describing a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment." Brief for United States as *Amicus Curiae* 18; see also Brief for Petitioner 18. In other words, Kodak could charge subcompetitive prices for equipment and make up the difference with supracompetitive prices for service, resulting in an overall competitive price. This pricing strategy would provide an explanation for the theory's descriptive failings—if Kodak in fact had adopted it. But Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service. Instead, it claims that it prices its equipment comparably to its competitors and intends that both its equipment sales and service divisions be profitable. See App. 159–161, 170, 178, 188. Moreover, this hypothetical pricing strategy is inconsistent with Kodak's policy toward its self-service customers. If Kodak were underpricing its equipment, hoping to lock in customers and recover its losses in the service

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repeating the mantra "interbrand competition" does not transform this case into one over an agreement the manufacturer has with its dealers that would fall under the rubric of *Continental T. V.*

market, it could not afford to sell customers parts without service. In sum, Kodak's theory does not explain the actual market behavior revealed in the record.

Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create a less responsive connection between service and parts prices and equipment sales.

For the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the "package"—equipment, service, and parts—at the time of purchase; that is, consumers must engage in accurate life-cycle pricing.[19] Life-cycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime," and losses incurred from downtime.[20]

Much of this information is difficult—some of it impossible—to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a

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[19] See Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 676 (1982); Beales, Craswell, & Salop, The Efficient Regulation of Consumer Information, 24 J. Law & Econ. 491, 509–511 (1981); *Jefferson Parish*, 466 U. S., at 15.

[20] In addition, of course, in order to price accurately the equipment, a consumer would need initial purchase information such as prices, features, quality, and available warranties for different machinery with different capabilities, and residual value information such as the longevity of product use and its potential resale or trade-in value.

decreased need for repair, or new warranties. In addition, the information is likely to be customer specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime.

Kodak acknowledges the cost of information, but suggests, again without evidentiary support, that customer information needs will be satisfied by competitors in the equipment markets. Brief for Petitioner 26, n. 11. It is a question of fact, however, whether competitors would provide the necessary information. A competitor in the equipment market may not have reliable information about the lifecycle costs of complex equipment it does not service or the needs of customers it does not serve. Even if competitors had the relevant information, it is not clear that their interests would be advanced by providing such information to consumers. See 2 P. Areeda & D. Turner, Antitrust Law ¶ *404b1* (1978).[21]

Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to

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[21] To inform consumers about Kodak, the competitor must be willing to forgo the opportunity to reap supracompetitive prices in its own service and parts markets. The competitor may anticipate that charging lower service and parts prices and informing consumers about Kodak in the hopes of gaining future equipment sales will cause Kodak to lower the price on its service and parts, canceling any gains in equipment sales to the competitor and leaving both worse off. Thus, in an equipment market with relatively few sellers, competitors may find it more profitable to adopt Kodak's service and parts policy than to inform the consumers. See 2 Areeda & Turner, Antitrust Law ¶ *404b1;* App. 177 (Kodak, Xerox, and IBM together have nearly 100% of relevant market).

Even in a market with many sellers, any one competitor may not have sufficient incentive to inform consumers because the increased patronage attributable to the corrected consumer beliefs will be shared among other competitors. Beales, Craswell, & Salop, 24 J. Law & Econ., at 503–504, 506.

compile the information. Similarly, some consumers, such as the Federal Government, have purchasing systems that make it difficult to consider the complete cost of the "package" at the time of purchase. State and local governments often treat service as an operating expense and equipment as a capital expense, delegating each to a different department. These governmental entities do not lifecycle price, but rather choose the lowest price in each market. See Brief for National Association of State Purchasing Officials et al. as *Amici Curiae;* Brief for State of Ohio et al. as *Amici Curiae;* App. 429–430.

As Kodak notes, there likely will be some large-volume, sophisticated purchasers who will undertake the comparative studies and insist, in return for their patronage, that Kodak charge them competitive lifecycle prices. Kodak contends that these knowledgeable customers will hold down the package price for all other customers. Brief for Petitioner 23, n. 9. There are reasons, however, to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too. As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the service market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed. A seller could easily price discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.

Given the potentially high cost of information and the possibility that a seller may be able to price discriminate between knowledgeable and unsophisticated consumers, it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based

on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.[22]

Indeed, respondents have presented evidence that Kodak practices price discrimination by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party service companies. Companies that have their own service staff are likely to be high-volume users, the same companies for whom it is most likely to be economically worthwhile to acquire the complex information needed for comparative lifecycle pricing.

A second factor undermining Kodak's claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product. See Areeda & Turner ¶ 519a.[23] If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers.

Moreover, if the seller can price discriminate between its locked-in customers and potential new customers, this strategy is even more likely to prove profitable. The seller could simply charge new customers below-marginal cost on the equipment and recoup the charges in service, or offer pack-

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[22] See Salop & Stiglitz, Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion, 44 Rev. Econ. Studies 493 (1977); Salop, Information and Market Structure—Information and Monopolistic Competition, 66 Am. Econ. Rev. 240 (1976); Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961).

[23] A firm can exact leverage whenever other equipment is not a ready substitute. F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 16–17 (3d ed. 1990).

ages with lifetime warranties or long-term service agreements that are not available to locked-in customers.

Respondents have offered evidence that the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, makes switching costs very high for existing Kodak customers. And Kodak's own evidence confirms that it varies the package price of equipment/parts/service for different customers.

In sum, there is a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another.[24]

We conclude, then, that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.[25] It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-

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[24] The dissent disagrees based on its hypothetical case of a tie between equipment and service. "The only thing lacking" to bring this case within the hypothetical case, states the dissent, "is concrete evidence that the restrictive parts policy was . . . generally known." *Post*, at 492. But the dissent's "only thing lacking" is the crucial thing lacking—evidence. Whether a tie between parts and service should be treated identically to a tie between equipment and service, as the dissent and Kodak argue, depends on whether the equipment market prevents the exertion of market power in the parts market. Far from being "anomalous," *post*, at 492–493, requiring Kodak to provide evidence on this factual question is completely consistent with our prior precedent. See, *e. g.*, n. 13, *supra*.

[25] Cf. *Instructional Systems*, 817 F. 2d, at 646 (finding the conspiracy reasonable under *Matsushita* because its goals were in fact achieved).

term loss. Viewing the evidence in the light most favorable to respondents, their allegations of market power "mak[e] . . . economic sense." Cf. *Matsushita*, 475 U. S., at 587.

Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of deterring procompetitive conduct. Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." *Id.*, at 594. Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly" and would "chill the very conduct the antitrust laws are designed to protect." *Ibid.* See also *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 763 (1984) (permitting inference of concerted action would "deter or penalize perfectly legitimate conduct"). But the facts in this case are just the opposite. The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.

Kodak contends that, despite the appearance of anticompetitiveness, its behavior actually favors competition because its ability to pursue innovative marketing plans will allow it to compete more effectively in the equipment market. Brief for Petitioner 40–41. A pricing strategy based on lower equipment prices and higher aftermarket prices could enhance equipment sales by making it easier for the buyer to finance the initial purchase.[26] It is undisputed that competition is enhanced when a firm is able to offer various marketing options, including bundling of support and maintenance service with the sale of equipment. Nor do such ac-

[26] It bears repeating that in this case Kodak has never claimed that it is in fact pursuing such a pricing strategy.

tions run afoul of the antitrust laws.[27] But the procompetitive effect of the specific conduct challenged here, eliminating all consumer parts and service options, is far less clear.[28]

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment. Cf. *Matsushita*, 475 U. S., at 594–595.

For the foregoing reasons, we hold that Kodak has not met the requirements of Federal Rule of Civil Procedure 56(c). We therefore affirm the denial of summary judgment on respondents' § 1 claim.[29]

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[27] See *Jefferson Parish*, 466 U. S., at 12 ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act"). See also Yates & DiResta, Software Support and Hardware Maintenance Practices: Tying Considerations, The Computer Lawyer, Vol. 8, No. 6, p. 17 (1991) (describing various service and parts policies that enhance quality and sales but do not violate the antitrust laws).

[28] Two of the largest consumers of service and parts contend that they are worse off when the equipment manufacturer also controls service and parts. See Brief for State Farm Mutual Automobile Insurance Co. et al. as *Amici Curiae;* Brief for State of Ohio et al. as *Amici Curiae.*

[29] The dissent urges a radical departure in this Court's antitrust law. It argues that because Kodak has only an "inherent" monopoly in parts for its equipment, *post,* at 489–490, the antitrust laws do not apply to its efforts to expand that power into other markets. The dissent's proposal to grant *per se* immunity to manufacturers competing in the service market would exempt a vast and growing sector of the economy from antitrust laws. Leaving aside the question whether the Court has the authority to

III

Respondents also claim that they have presented genuine issues for trial as to whether Kodak has monopolized, or at-

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make such a policy decision, there is no support for it in our jurisprudence or the evidence in this case.

Even assuming, despite the absence of any proof from the dissent, that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market. The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611 (1953); see, *e. g.*, *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1 (1958); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458, 463 (1938). Moreover, on the occasions when the Court has considered tying in derivative aftermarkets by manufacturers, it has not adopted any exception to the usual antitrust analysis, treating derivative aftermarkets as it has every other separate market. See *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). Our past decisions are reason enough to reject the dissent's proposal. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

Nor does the record in this case support the dissent's proposed exemption for aftermarkets. The dissent urges its exemption because the tie here "does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie." *Post*, at 498. Beyond the dissent's obvious difficulty in explaining why Kodak would adopt this expensive tying policy if it could achieve the same profits more conveniently through some other means, respondents offer an alternative theory, supported by the record, that suggests Kodak *is* able to exploit some customers who in the absence of the tie would be protected from increases in parts prices by knowledgeable customers. See *supra*, at 475–476.

At bottom, whatever the ultimate merits of the dissent's theory, at this point it is mere conjecture. Neither Kodak nor the dissent have provided

tempted to monopolize, the service and parts markets in violation of §2 of the Sherman Act. "The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U. S., at 570–571.

A

The existence of the first element, possession of monopoly power, is easily resolved. As has been noted, respondents have presented a triable claim that service and parts are separate markets, and that Kodak has the "power to control prices or exclude competition" in service and parts. *Du Pont*, 351 U. S., at 391. Monopoly power under §2 requires, of course, something greater than market power under §1. See *Fortner*, 394 U. S., at 502. Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of §2. See *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 112 (1984). Cf. *United States* v. *Grinnell Corp.*, 384 U. S., at 571 (87% of the market is a monopoly); *American Tobacco Co.* v. *United States*, 328 U. S. 781, 797 (1946) (over two-thirds of the market is a monopoly).

Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. The relevant mar-

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any evidence refuting respondents' theory of forced unwanted purchases at higher prices and price discrimination. While it may be, as the dissent predicts, that the equipment market will prevent any harms to consumers in the aftermarkets, the dissent never makes plain why the Court should accept that theory on faith rather than requiring the usual evidence needed to win a summary judgment motion.

ket for antitrust purposes is determined by the choices available to Kodak equipment owners. See *Jefferson Parish*, 466 U. S., at 19. Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines. See *Du Pont*, 351 U. S., at 404 ("The market is composed of products that have reasonable interchangeability").[30] This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. See *National Collegiate Athletic Assn.*, 468 U. S., at 101–102, 111–112; *International Boxing Club of New York, Inc.* v. *United States*, 358 U. S. 242, 249–252 (1959); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936).[31] The proper market definition in this case can be determined only after a factual inquiry into the "commercial realities" faced by consumers. *United States* v. *Grinnell Corp.*, 384 U. S., at 572.

B

The second element of a §2 claim is the use of monopoly power "to foreclose competition, to gain a competitive advan-

[30] Kodak erroneously contends that this Court in *Du Pont* rejected the notion that a relevant market could be limited to one brand. Brief for Petitioner 33. The Court simply held in *Du Pont* that one brand does not *necessarily* constitute a relevant market if substitutes are available. 351 U. S., at 393. See also *Boxing Club*, 358 U. S., at 249–250. Here respondents contend there are no substitutes.

[31] Other courts have limited the market to parts for a particular brand of equipment. See, *e. g.*, *International Logistics Group, Ltd.* v. *Chrysler Corp.*, 884 F. 2d 904, 905, 908 (CA6 1989) (parts for Chrysler cars is the relevant market), cert. denied, 494 U. S. 1066 (1990); *Dimidowich* v. *Bell & Howell*, 803 F. 2d 1473, 1480–1481, n. 3 (CA9 1986), modified, 810 F. 2d 1517 (1987) (service for Bell & Howell equipment is the relevant market); *In re General Motors Corp.*, 99 F. T. C. 464, 554, 584 (1982) (crash parts for General Motors cars is the relevant market); *Heatransfer Corp.* v. *Volkswagenwerk A. G.*, 553 F. 2d 964 (CA5 1977) (air conditioners for Volkswagens is the relevant market), cert. denied, 434 U. S. 1087 (1978).

tage, or to destroy a competitor." *United States* v. *Griffith*, 334 U. S. 100, 107 (1948). If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2. *Grinnell Corp.*, 384 U. S., at 570–571; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (CA2 1945); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. 585, 600–605 (1985).[32]

As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions. *Id.*, at 605; *United States* v. *Aluminum Co. of America*, 148 F. 2d, at 432. Kodak contends that it has three valid business justifications for its actions: "(1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free-riding on Kodak's capital investment in equipment, parts and service." Brief for Petitioner 6. Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

Kodak first asserts that by preventing customers from using ISO's, "it [can] best maintain high quality service for its sophisticated equipment" and avoid being "blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO." *Id.*, at 6–7. Respondents have offered evidence that ISO's provide quality service and are preferred by some Kodak equipment owners. This is sufficient to raise a genuine issue of

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[32] It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal. See *Aspen Skiing Co.*, 472 U. S., at 602–605.

fact. See *International Business Machines Corp.* v. *United States*, 298 U. S., at 139–140 (rejecting IBM's claim that it had to control the cards used in its machines to avoid "injury to the reputation of the machines and the good will of" IBM in the absence of proof that other companies could not make quality cards); *International Salt Co.* v. *United States*, 332 U. S. 392, 397–398 (1947) (rejecting International Salt's claim that it had to control the supply of salt to protect its leased machines in the absence of proof that competitors could not supply salt of equal quality).

Moreover, there are other reasons to question Kodak's proffered motive of commitment to quality service; its quality justification appears inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price, and its self-service policy. Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from inferior ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other. In addition, because self-service customers are just as likely as others to blame Kodak equipment for breakdowns resulting from (their own) inferior service, Kodak's willingness to allow self-service casts doubt on its quality claim. In sum, we agree with the Court of Appeals that respondents "have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual." 903 F. 2d, at 618.

There is also a triable issue of fact on Kodak's second justification—controlling inventory costs. As respondents argue, Kodak's actions appear inconsistent with any need to control inventory costs. Presumably, the inventory of parts

needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISO's perform the repair. More importantly, the justification fails to explain respondents' evidence that Kodak forced OEM's, equipment owners, and parts brokers not to sell parts to ISO's, actions that would have no effect on Kodak's inventory costs.

Nor does Kodak's final justification entitle it to summary judgment on respondents' §2 claim. Kodak claims that its policies prevent ISO's from "exploit[ing] the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues." Brief for Petitioner 7–8. Kodak does not dispute that respondents invest substantially in the service market, with training of repair workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law.[33] To the contrary, as the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously. *Jefferson Parish*, 466 U. S., at 14; *Fortner*, 394 U. S., at 509.

None of Kodak's asserted business justifications, then, are sufficient to prove that Kodak is "entitled to a judgment as

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[33] Kodak claims that both *Continental T. V.* and *Monsanto* support its free-rider argument. Neither is applicable. In both *Continental T. V.*, 433 U. S., at 55, and *Monsanto*, 465 U. S., at 762–763, the Court accepted free-riding as a justification because without restrictions a manufacturer would not be able to induce competent and aggressive retailers to make the kind of investment of capital and labor necessary to distribute the product. In *Continental T. V.* the relevant market level was retail sale of televisions and in *Monsanto* retail sales of herbicides. Some retailers were investing in those markets; others were not, relying, instead, on the investment of the other retailers. To be applicable to this case, the ISO's would have to be relying on Kodak's investment in the service market; that, however, is not Kodak's argument.

a matter of law" on respondents' §2 claim. Fed. Rule Civ. Proc. 56(c).

IV

In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

This is not, as the Court describes it, just "another case that concerns the standard for summary judgment in an antitrust controversy." *Ante*, at 454. Rather, the case presents a very narrow—but extremely important—question of substantive antitrust law: whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even "monopoly," power in wholly derivative aftermarkets for that equipment. In my view, the Court supplies an erroneous answer to this question, and I dissent.

I

Per se rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's pro-

competitive benefits and its anticompetitive costs. See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 350–351 (1982). "The character of the restraint produced by [behavior to which a *per se* rule applies] is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the [behavior] may be found." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 9 (1984). The *per se* rule against tying is just such a rule: Where the conditions precedent to application of the rule are met, *i. e.*, where the tying arrangement is backed up by the defendant's market power in the "tying" product, the arrangement is adjudged in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1988 ed., Supp. II), without *any* inquiry into the practice's actual effect on competition and consumer welfare. But see *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (ED Pa. 1960), aff'd, 365 U. S. 567 (1961) *(per curiam)* (accepting affirmative defense to *per se* tying allegation).

Despite intense criticism of the tying doctrine in academic circles, see, *e. g.*, R. Bork, The Antitrust Paradox 365–381 (1978), the stated rationale for our *per se* rule has varied little over the years. When the defendant has genuine "market power" in the tying product—the power to raise price by reducing output—the tie potentially enables him to extend that power into a second distinct market, enhancing barriers to entry in each. In addition:

> "[T]ying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 513–514 (1969) *(Fortner I)* (WHITE, J., dissenting) (footnotes omitted).

For these reasons, as we explained in *Jefferson Parish*, "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other." 466 U. S., at 14.

Our § 2 monopolization doctrines are similarly directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. See *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966). Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist. 3 P. Areeda & D. Turner, Antitrust Law ¶ 813, pp. 300–302 (1978) (hereinafter 3 Areeda & Turner).

The concerns, however, that have led the courts to heightened scrutiny both of the "exclusionary conduct" practiced by a monopolist and of tying arrangements subject to *per se* prohibition, are completely without force when the participants lack market power. As to the former, "[t]he [very] definition of exclusionary conduct," as practiced by a monopolist, is "predicated on the existence of substantial market power." *Id.*, ¶ 813, at 301; see, *e. g.*, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177–178 (1965) (fraudulent patent procurement); *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 75 (1911) (acquisition of competitors); 3 Areeda & Turner ¶ 724, at 195–197 (vertical integration). And with respect to tying, we have recognized that bundling arrangements not coerced by the heavy hand of market power can serve the procompetitive functions of facilitating new entry into cer-

tain markets, see, *e. g., Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), permitting "clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market," *Fortner I, supra*, at 514, n. 9 (WHITE, J., dissenting), assuring quality control, see, *e. g., Standard Oil Co. of Cal.* v. *United States*, 337 U. S. 293, 306 (1949), and, where "the tied and tying products are functionally related, . . . reduc[ing] costs through economies of joint production and distribution." *Fortner I, supra*, at 514, n. 9 (WHITE, J., dissenting). "Accordingly, we have [only] condemned tying arrangements [under the *per se* rule] when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, supra*, at 13–14.

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment—over the sale of distinctive repair parts for that equipment, for example—the sort of "monopoly power" sufficient to bring the sledgehammer of §2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products "market power" sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition. I shall explain, in Parts II and III, respectively, how neither logic *nor* experience suggests, let alone compels, ap-

plication of the *per se* tying prohibition and monopolization doctrine to a seller's behavior in its single-brand aftermarkets, when that seller is without power at the interbrand level.

II

On appeal in the Ninth Circuit, respondents, having waived their "rule of reason" claim, were limited to arguing that the record, construed in the light most favorable to them, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986), supported application of the *per se* tying prohibition to Kodak's restrictive parts and service policy. See 903 F. 2d 612, 615, n. 1 (1990). As the Court observes, in order to survive Kodak's motion for summary judgment on this claim, respondents bore the burden of proffering evidence on which a reasonable trier of fact could conclude that Kodak possesses power in the market for the alleged "tying" product. See *ante*, at 464; *Jefferson Parish*, 466 U. S., at 13–14.

A

We must assume, for purposes of deciding this case, that petitioner is without market, much less monopoly, power in the interbrand markets for its micrographic and photocopying equipment. See *ante*, at 465–466, n. 10; *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985). In the District Court, respondents did, in fact, include in their complaint an allegation which posited the interbrand equipment markets as the relevant markets; in particular, they alleged a §1 "tie" of micrographic and photocopying equipment to the parts and service for those machines. App. 22–23. Though this allegation was apparently abandoned in pursuit of §§1 and 2 claims focused exclusively on the parts and service aftermarkets (about which more later), I think it helpful to analyze how that claim would have fared under the *per se* rule.

Had Kodak—from the date of its entry into the micrographic and photocopying equipment markets—included a lifetime parts and service warranty with all original equip-

ment, or required consumers to purchase a lifetime parts and service contract with each machine, that bundling of equipment, parts, and service would no doubt constitute a tie under the tests enunciated in *Jefferson Parish, supra.* Nevertheless, it would be immune from *per se* scrutiny under the antitrust laws because the *tying* product would be *equipment,* a market in which (we assume) Kodak has no power to influence price or quantity. See *id.,* at 13–14; *United States Steel Corp.* v. *Fortner Enterprises, Inc.,* 429 U. S. 610, 620 (1977) *(Fortner II); Northern Pacific R. Co.* v. *United States,* 356 U. S. 1, 6–7 (1958). The same result would obtain, I think, had Kodak—from the date of its market entry—consistently pursued an announced policy of limiting parts sales in the manner alleged in this case, so that customers bought with the knowledge that aftermarket support could be obtained only from Kodak. The foreclosure of respondents from the business of servicing Kodak's micrographic and photocopying machines in these illustrations would be undeniably complete—as complete as the foreclosure described in respondents' complaint. Nonetheless, we would inquire no further than to ask whether Kodak's *market power* in the equipment market effectively forced consumers to purchase Kodak micrographic or photocopying machines subject to the company's restrictive aftermarket practices. If not, that would end the case insofar as the *per se* rule was concerned. See *Jefferson Parish, supra,* at 13–14; 9 P. Areeda, Antitrust Law ¶ 1709c5, pp. 101–102 (1991); Klein & Saft, The Law and Economics of Franchise Tying Contracts, 28 J. Law & Econ. 345, 356 (1985). The evils against which the tying prohibition is directed would simply not be presented. Interbrand competition would render Kodak powerless to gain economic power over an additional class of consumers, to price discriminate by charging each customer a "system" price equal to the system's economic value to that customer, or to raise barriers to entry in the interbrand equipment markets. See 3 Areeda & Turner ¶ 829d, at 331–332.

I have described these illustrations as hypothetical, but in fact they are not far removed from this case. The record below is consistent—in large part—with just this sort of bundling of equipment on the one hand, with parts and service on the other. The restrictive parts policy, with respect to micrographic equipment at least, was not even alleged to be anything but prospective. See App. 17. As respondents summarized their factual proffer below:

> "Under this policy, Kodak cut off parts on new products to Kodak micrographics [independent service organizations] ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all." *Id.*, at 360.

As to Kodak copiers, Kodak's restrictive parts policy had a broader foundation: Considered in the light most favorable to respondents, see *Anderson*, *supra*, at 255, the record suggests that, from its inception, the policy was applied to new and existing copier customers alike. But at least all post-1985 purchasers of micrographic equipment, like all post-1985 purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) squarely within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known. Thus, under the Court's approach the existence *vel non* of such evidence is determinative of the legal standard (the *per se* rule versus the rule of reason) under which the alleged tie is examined. In my judgment, this makes no sense. It is

quite simply anomalous that a manufacturer functioning in a competitive equipment market should be exempt from the *per se* rule when it bundles equipment with parts and service, but not when it bundles parts with service. This vast difference in the treatment of what will ordinarily be economically similar phenomena is alone enough to call today's decision into question.

B

In the Court of Appeals, respondents sought to sidestep the impediment posed by interbrand competition to their invocation of the *per se* tying rule by zeroing in on the parts and service "aftermarkets" for Kodak equipment. By alleging a tie of *parts* to service, rather than of *equipment* to parts and service, they identified a tying product in which Kodak unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines. See *Jefferson Parish*, 466 U. S., at 17. The Court today holds that such a facial showing of market share in a single-brand aftermarket is sufficient to invoke the *per se* rule. The existence of even vibrant interbrand competition is no defense. See *ante*, at 470–471.

I find this a curious form of market power on which to premise the application of a *per se* proscription. It is enjoyed by virtually every manufacturer of durable goods requiring aftermarket support with unique, or relatively unique, goods. See P. Areeda & H. Hovenkamp, Antitrust Law ¶ 525.1, p. 563 (Supp. 1991). "[S]uch reasoning makes every maker of unique parts for its own product a holder of market power *no matter how unimportant its product might be in the market.*" *Ibid.* (emphasis added).[1] Under

[1] That there exist innumerable parts and service firms in such industries as the automobile industry, see Brief for Automotive Warehouse Distributors Association et al. as *Amici Curiae* 2–3, does not detract from this point. The question whether power to control an aftermarket exists is quite distinct from the question whether the power has been exercised. Manufacturers in some markets have no doubt determined that exclusion-

the Court's analysis, the *per se* rule may now be applied to single-brand ties effected by the most insignificant players in fully competitive interbrand markets, as long as the arrangement forecloses aftermarket competitors from more than a *de minimis* amount of business, *Fortner I*, 394 U. S., at 501. This seems to me quite wrong. A tying arrangement "forced" through the exercise of such power no more implicates the leveraging and price discrimination concerns behind the *per se* tying prohibition than does a tie of the foremarket brand to its aftermarket derivatives, which—as I have explained—would not be subject to *per se* condemnation.[2] As implemented, the Kodak arrangement challenged

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ary intrabrand conduct works to their disadvantage at the competitive interbrand level, but this in no way refutes the self-evident reality that control over unique replacement parts for single-branded goods is ordinarily available to such manufacturers for the taking. It confounds sound analysis to suggest, as respondents do, see Brief for Respondents 5, 37, that the asserted fact that Kodak manufactures only 10% of its replacement parts, and purchases the rest from original equipment manufacturers, casts doubt on Kodak's possession of an inherent advantage in the aftermarkets. It does no such thing, any more than Kodak's contracting with others for the manufacture of all constituent parts included in its original equipment would alone suggest that Kodak lacks power in the *interbrand* micrographic and photocopying equipment markets. The suggestion implicit in respondents' analysis—that if a seller chooses to contract for the manufacture of its branded merchandise, it must permit the contractors to compete in the sale of that merchandise—is plainly unprecedented.

[2] Even *with* interbrand power, I may observe, it is unlikely that Kodak could have incrementally exploited its position through the tie of parts to service alleged here. Most of the "service" at issue is inherently associated with the parts, *i. e.*, that service involved in incorporating the parts into Kodak equipment, and the two items tend to be demanded by customers in fixed proportions (one part with one unit of service necessary to install the part). When that situation obtains, "'no revenue can be derived from setting a higher price for the tied product which could not have been made by setting the optimum price for the tying product.'" P. Areeda & L. Kaplow, Antitrust Analysis ¶ 426(a), p. 706 (4th ed. 1988) (quoting Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957)). These observations strongly suggest that Kodak

in this case may have implicated truth-in-advertising or other consumer protection concerns, but those concerns do not alone suggest an antitrust prohibition. See, *e. g.*, *Town Sound and Custom Tops, Inc.* v. *Chrysler Motors Corp.*, 959 F. 2d 468 (CA3 1992) (en banc).

In the absence of interbrand power, a seller's predominant or monopoly share of its single-brand derivative markets does not connote the power to raise derivative market prices *generally* by reducing quantity. As Kodak and its principal *amicus*, the United States, point out, a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support. "[B]oth the price of the equipment and the price of parts and service over the life of the equipment are expenditures that are necessary to obtain copying and micrographic services." Brief for United States as *Amicus Curiae* 13. If Kodak set generally supracompetitive prices for either spare parts or repair services without making an offsetting reduction in the price of its machines, rational consumers would simply turn to Kodak's competitors for photocopying and micrographic systems. See, *e. g.*, *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F. 2d 792, 796–798 (CA1 1988). True, there are—as the Court notes, see *ante*, at 474–475—the occasional irrational consumers that consider only the hardware cost at the time of purchase (a category that regrettably includes the Federal Government, whose "purchasing system," we are told, assigns foremarket purchases and aftermarket purchases to different entities). But

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parts and the service involved in installing them should not be treated as distinct products for antitrust tying purposes. See *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 39 (1984) (O'CONNOR, J., concurring in judgment) ("For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original) (footnote omitted); Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1009–1010 (1974).

we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer.

The Court attempts to counter this theoretical point with a theory of its own. It says that there are "information costs"—the costs and inconvenience to the consumer of acquiring and processing life-cycle pricing data for Kodak machines—that "could create a less responsive connection between service and parts prices and equipment sales." *Ante*, at 473. But this truism about the functioning of markets for sophisticated equipment cannot create "market power" of concern to the antitrust laws where otherwise there is none. "Information costs," or, more accurately, gaps in the availability and quality of consumer information, pervade real-world markets; and because consumers generally make do with "rough cut" judgments about price in such circumstances, in virtually any market there are zones within which otherwise competitive suppliers may overprice their products without losing appreciable market share. We have never suggested that the principal players in a market with such commonplace informational deficiencies (and, thus, bands of apparent consumer pricing indifference) exercise market power in any sense relevant to the antitrust laws. "While [such] factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." *Jefferson Parish*, 466 U. S., at 27; see, *e. g.*, *Town Sound and Custom Tops, Inc.* v. *Chrysler Motors Corp.*, *supra*.

Respondents suggest that, even if the existence of interbrand competition prevents Kodak from raising prices *generally* in its single-brand aftermarkets, there remain certain consumers who are necessarily subject to abusive Kodak pricing behavior by reason of their being "locked in" to their investments in Kodak machines. The Court agrees; indeed, it goes further by suggesting that even a *general* policy of supracompetitive aftermarket prices might be profitable over the long run because of the "lock-in" phenomenon. "[A]

seller profitably could maintain supracompetitive prices in the aftermarket," the Court explains, "if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers." *Ante*, at 476. In speculating about this latter possibility, the Court is essentially repudiating the assumption on which we are bound to decide this case, viz., Kodak's lack of any power whatsoever in the interbrand market. If Kodak's *general* increase in aftermarket prices were to bring the total "system" price above competitive levels in the interbrand market, Kodak would be wholly unable to make further foremarket sales—and would find itself exploiting an ever-dwindling aftermarket, as those Kodak micrographic and photocopying machines already in circulation passed into disuse.

The Court's narrower point, however, is undeniably true. There will be consumers who, because of their capital investment in Kodak equipment, "will tolerate some level of service-price increases before changing equipment brands," *ibid.*; this is *necessarily* true for "every maker of unique parts for its own product." Areeda & Hovenkamp, Antitrust Law ¶ 525.1b, at 563. But this "circumstantial" leverage created by consumer investment regularly crops up in smoothly functioning, even perfectly competitive, markets, and in most—if not all—of its manifestations, it is of no concern to the antitrust laws. The leverage held by the manufacturer of a malfunctioning refrigerator (which is measured by the consumer's reluctance to walk away from his initial investment in that device) is no different in kind or degree from the leverage held by the swimming pool contractor when he discovers a 5-ton boulder in his customer's backyard and demands an additional sum of money to remove it; or the leverage held by an airplane manufacturer over an airline that has "standardized" its fleet around the manufacturer's models; or the leverage held by a drill press manufacturer whose customers have built their production lines around the

manufacturer's particular style of drill press; or the leverage held by an insurance company over its independent sales force that has invested in company-specific paraphernalia; or the leverage held by a mobile home park owner over his tenants, who are unable to transfer their homes to a different park except at great expense, see generally *Yee* v. *Escondido*, 503 U. S. 519 (1992). Leverage, in the form of *circumstantial* power, plays a role in each of these relationships; but in none of them is the leverage attributable to the dominant party's *market* power in any relevant sense. Though that power can plainly work to the injury of certain consumers, it produces only "a brief perturbation in competitive conditions—not the sort of thing the antitrust laws do or should worry about." *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d 228, 236 (CA7 1988) (Posner, J., dissenting).

The Court correctly observes that the antitrust laws do not permit even a *natural* monopolist to project its monopoly power into another market, *i. e.*, to "'exploi[t] his dominant position in one market to expand his empire into the next.'" *Ante*, at 480, n. 29 (quoting *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611 (1953)). However, when a manufacturer uses its control over single-branded parts to acquire influence in single-branded service, the monopoly "leverage" is almost invariably of no practical consequence, because of perfect identity between the consumers in each of the subject aftermarkets (those who need replacement parts for Kodak equipment and those who need servicing of Kodak equipment). When that condition exists, the tie does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie. Cf., *e. g.*, Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21–27 (1957).

We have never before accepted the thesis the Court today embraces: that a seller's inherent control over the unique

parts for its own brand amounts to "market power" of a character sufficient to permit invocation of the *per se* rule against tying. As the Court observes, *ante*, at 479–481, n. 29, we have applied the *per se* rule to manufacturer ties of *foremarket* equipment to aftermarket derivatives—but only when the manufacturer's monopoly power in the equipment, coupled with the use of derivative sales as "counting devices" to measure the intensity of customer equipment usage, enabled the manufacturer to engage in price discrimination, and thereby more fully exploit its interbrand power. See *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). That sort of enduring opportunity to engage in price discrimination is unavailable to a manufacturer—like Kodak—that lacks power at the interbrand level. A tie between two aftermarket derivatives does next to nothing to improve a competitive manufacturer's ability to extract monopoly rents from its consumers.[3]

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[3] The Court insists that the record in this case suggests otherwise, *i. e.*, that a tie between parts and service somehow *does* enable Kodak to increase overall monopoly profits. See *ante*, at 479–481, n. 29. Although the Court does not identify the record evidence on which it relies, the suggestion, apparently, is that such a tie facilitates price discrimination between sophisticated, "high-volume" users of Kodak equipment and their unsophisticated counterparts. The sophisticated users (who, the Court presumes, invariably self-service their equipment) are permitted to buy Kodak parts without also purchasing supracompetitively priced Kodak service, while the unsophisticated are—through the imposition of the tie—compelled to buy both. See *ante*, at 475–476.

While superficially appealing, at bottom this explanation lacks coherence. Whether they self-service their equipment or not, rational foremarket consumers (those consumers who are not yet "locked in" to Kodak hardware) will be driven to Kodak's competitors if the price of Kodak equipment, together with the expected cost of aftermarket support, exceeds competitive levels. This will be true no matter how Kodak distributes the total system price among equipment, parts, and service. See

Nor has any court of appeals (save for the Ninth Circuit panel below) recognized single-branded aftermarket power as a basis for invoking the *per se* tying prohibition. See *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F. 2d 1318, 1328 (CA6 1992) ("Defining the market by customer demand *after* the customer has chosen a single supplier fails to take into account that the supplier . . . must compete with other similar suppliers to be designated the

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supra, at 495. Thus, as to these consumers, Kodak's lack of interbrand power wholly prevents it from employing a tie between parts and service as a vehicle for price discrimination. Nor does a tie between parts and service offer Kodak incremental exploitative power over those consumers—sophisticated or not—who have the supposed misfortune of being "locked in" to Kodak equipment. If Kodak desired to exploit its circumstantial power over this wretched class by pressing them up to the point where the cost to each consumer of switching equipment brands barely exceeded the cost of retaining Kodak equipment and remaining subject to Kodak's abusive practices, it could plainly do so without the inconvenience of a tie, through supracompetitive parts pricing alone. Since the locked-in *sophisticated* parts purchaser is as helpless as the locked-in *unsophisticated* one, I see nothing to be gained by price discrimination in favor of the former. If such price discrimination were desired, however, it would not have to be accomplished indirectly, through a tie of parts to service. Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a), would prevent giving lower parts prices to the sophisticated customers only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." *Ibid.*; see, *e. g.*, *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U. S. 428, 434–435 (1983). That prohibited effect often occurs when price-discriminated goods are sold for resale (*i. e.*, to purchasers who are necessarily in competition with one another). *E. g.*, *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 47 (1948); see P. Areeda & L. Kaplow, Antitrust Analysis ¶600, p. 923 (1988) ("Secondary-line injury arises [under the Robinson-Patman Act] when a powerful firm buying supplies at favorable prices thereby gains a decisive advantage over its competitors that are forced to pay higher prices for their supplies"). It rarely occurs where, as would be the case here, the price-discriminated goods are sold to various businesses for consumption.

sole source in the first place"); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F. 2d, at 798 ("[W]e do not see how such dealer investment [in facilities to sell Subaru products] . . . could easily translate into Subaru market power of a kind that, through tying, could ultimately lead to higher than competitive prices for consumers"); *A. I. Root Co.* v. *Computer/Dynamics, Inc.*, 806 F. 2d 673, 675–677, and n. 3 (CA6 1986) (competition at "small business computer" level precluded assertion of computer manufacturer's power over software designed for use only with manufacturer's brand of computer); *General Business Systems* v. *North American Philips Corp.*, 699 F. 2d 965, 977 (CA9 1983) ("To have attempted to impose significant pressure to buy [aftermarket hardware] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market"). See also *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d, at 233 (law-of-the-case doctrine compelled finding of market power in replacement parts for single-brand engine).

We have recognized in closely related contexts that the deterrent effect of *inter*brand competition on the exploitation of *intra*brand market power should make courts exceedingly reluctant to apply rules of *per se* illegality to intrabrand restraints. For instance, we have refused to apply a rule of *per se* illegality to vertical nonprice restraints "because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition," *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51–52 (1977), the latter of which we described as "the primary concern of antitrust law," *id.*, at 52, n. 19. We noted, for instance, that "new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer," and that "[e]stablished manufacturers can use them

to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.*, at 55. See also *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 726 (1988). The same assumptions, in my opinion, should govern our analysis of ties alleged to have been "forced" solely through *intra*brand market power. In the absence of interbrand power, a manufacturer's bundling of aftermarket products may serve a multitude of legitimate purposes: It may facilitate manufacturer efforts to ensure that the equipment remains operable and thus protect the seller's business reputation, see *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp., at 560; it may create the conditions for implicit consumer financing of the acquisition cost of the tying equipment through supracompetitively-priced aftermarket purchases, see, *e. g.*, A. Oxenfeldt, Industrial Pricing and Market Practices 378 (1951); and it may, through the resultant manufacturer control of aftermarket activity, "yield valuable information about component or design weaknesses that will materially contribute to product improvement," 3 Areeda & Turner ¶ 733c, at 258–259; see also *id.*, ¶ 829d, at 331–332. Because the interbrand market will generally punish intrabrand restraints that consumers do not find in their interest, we should not—under the guise of a *per se* rule—condemn such potentially procompetitive arrangements simply because of the antitrust defendant's inherent power over the unique parts for its own brand.

I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie's *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis, see, *e. g.*, *Jefferson Parish*, 466 U. S., at 41 (O'CONNOR, J., concurring in judgment). Disposition of this case does not require such an examination, however, as respondents apparently waived any rule-of-reason claim they

may have had in the District Court. I would thus reverse the Ninth Circuit's judgment on the tying claim outright.

III

These considerations apply equally to respondents' §2 claims. An antitrust defendant lacking relevant "market power" sufficient to permit invocation of the *per se* prohibition against tying *a fortiori* lacks the monopoly power that warrants heightened scrutiny of his allegedly exclusionary behavior. Without even so much as asking whether the purposes of §2 are implicated here, the Court points to Kodak's control of "100% of the parts market and 80% to 95% of the service market," markets with "no readily available substitutes," *ante*, at 481, and finds that the proffer of such statistics is sufficient to fend off summary judgment. But this showing could easily be made, as I have explained, with respect to virtually any manufacturer of differentiated products requiring aftermarket support. By permitting antitrust plaintiffs to invoke §2 simply upon the unexceptional demonstration that a manufacturer controls the supplies of its single-branded merchandise, the Court transforms §2 from a specialized mechanism for responding to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts.

In my view, if the interbrand market is vibrant, it is simply not necessary to enlist §2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers. See *Business Electronics Corp., supra*, at 725; *Continental T. V., Inc., supra*, at 52, n. 19, 54. Because this case comes to us on the as-

sumption that Kodak is without such interbrand power, I believe we are compelled to reverse the judgment of the Court of Appeals. I respectfully dissent.

Syllabus

UNITED STATES *v.* THOMPSON/CENTER ARMS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 91–164. Argued January 13, 1992—Decided June 8, 1992

Respondent manufactures the "Contender" pistol and, for a short time, also manufactured a kit that could be used to convert the Contender into a rifle with either a 21-inch or a 10-inch barrel. The Bureau of Alcohol, Tobacco and Firearms advised respondent that when the kit was possessed or distributed with the Contender, the unit constituted a "firearm" under the National Firearms Act (NFA or Act), 26 U. S. C. § 5845(a)(3), which defines that term to include a rifle with a barrel less than 16 inches long, known as a short-barreled rifle, but not a pistol or a rifle having a barrel 16 inches or more in length. Respondent paid the $200 tax levied by § 5821 upon anyone "making" a "firearm" and filed a claim for a refund. When its refund claim proved fruitless, respondent brought this suit under the Tucker Act. The Claims Court entered summary judgment for the Government, but the Court of Appeals reversed, holding that a short-barreled rifle "actually must be assembled" in order to be "made" within the NFA's meaning.

Held: The judgment is affirmed.

924 F. 2d 1041, affirmed.

JUSTICE SOUTER, joined by THE CHIEF JUSTICE and JUSTICE O'CONNOR, concluded that the Contender and conversion kit when packaged together have not been "made" into a short-barreled rifle for NFA purposes. Pp. 509–518.

(a) The language of § 5845(i)—which provides that "[t]he term 'make', and [its] various derivatives . . . , shall include manufacturing . . . , putting together . . . , or otherwise producing a firearm"—clearly demonstrates that the aggregation of separate parts that can be assembled only into a firearm, and the aggregation of a gun other than a firearm and parts that would have no use in association with the gun except to convert it into a firearm, constitute the "making" of a firearm. If, as the Court of Appeals held, a firearm were only made at the time of final assembly (the moment the firearm was "put together"), the statutory "manufacturing . . . or otherwise producing" language would be redundant. Thus, Congress must have understood "making" to cover more than final assembly, and some disassembled aggregation of parts must be included. Pp. 509–512.

(b) However, application of the ordinary rules of statutory construction shows that the Act is ambiguous as to whether, given the fact that the Contender can be converted into either an NFA-regulated firearm or an unregulated rifle, the mere possibility of its use with the kit to assemble the former renders their combined packaging "making." Pp. 512–517.

(c) The statutory ambiguity is properly resolved by applying the rule of lenity in respondent's favor. See, *e. g., Crandon* v. *United States*, 494 U. S. 152, 168. Although it is a tax statute that is here construed in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. Making a firearm without approval may be subject to criminal sanction, as is possession of, or failure to pay the tax on, an unregistered firearm. Pp. 517–518.

JUSTICE SCALIA, joined by JUSTICE THOMAS, agreed that the rule of lenity prevents respondent's pistol and conversion kit from being covered by the NFA, but on the basis of different ambiguities: whether a firearm includes unassembled parts, and whether the requisite "inten[t] to be fired from the shoulder" existed as to the short-barrel component. Pp. 519–523.

SOUTER, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 519. WHITE, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and KENNEDY, JJ., joined, *post*, p. 523. STEVENS, J., filed a dissenting opinion, *post*, p. 525.

James A. Feldman argued the cause for the United States. On the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Kent L. Jones, Gilbert S. Rothenberg*, and *Steven W. Parks*.

Stephen P. Halbrook argued the cause and filed a brief for respondent.*

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE O'CONNOR join.

Section 5821 of the National Firearms Act (NFA or Act), see 26 U. S. C. § 5849, levies a tax of $200 per unit upon any-

**Richard E. Gardiner* filed a brief for Senator Larry E. Craig et al. as *amici curiae* urging affirmance.

one "making" a "firearm" as that term is defined in the Act. Neither pistols nor rifles with barrels 16 inches long or longer are firearms within the NFA definition, but rifles with barrels less than 16 inches long, known as short-barreled rifles, are. § 5845(a)(3). This case presents the question whether a gun manufacturer "makes" a short-barreled rifle when it packages as a unit a pistol together with a kit containing a shoulder stock and a 21-inch barrel, permitting the pistol's conversion into an unregulated long-barreled rifle,[1] or, if the pistol's barrel is left on the gun, a short-barreled rifle that is regulated. We hold that the statutory language may not be construed to require payment of the tax under these facts.

I

The word "firearm" is used as a term of art in the NFA. It means, among other things, "a rifle having a barrel or barrels of less than 16 inches in length . . . ." § 5845(a)(3). "The term 'rifle' means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge." § 5845(c).

The consequence of being the maker of a firearm are serious. Section 5821(a) imposes a tax of $200 "for each firearm made," which "shall be paid by the person making the firearm," § 5821(b). Before one may make a firearm, one must obtain the approval of the Secretary of the Treasury, § 5822, and § 5841 requires that the "manufacturer, importer, and maker . . . register each firearm he manufactures, imports, or makes" in a central registry maintained by the Secretary of the Treasury. A maker who fails to comply with the NFA's provisions is subject to criminal penalties of up to 10

[1] Unregulated, that is, under the NFA.

years' imprisonment and a fine of up to $10,000, or both, which may be imposed without proof of willfulness or knowledge. § 5871.

Respondent Thompson/Center Arms Company manufactures a single-shot pistol called the "Contender," designed so that its handle and barrel can be removed from its "receiver," the metal frame housing the trigger, hammer, and firing mechanism. See 27 CFR § 179.11 (1991) (definition of frame or receiver). For a short time in 1985, Thompson/Center also manufactured a carbine-conversion kit consisting of a 21-inch barrel, a rifle stock, and a wooden fore-end. If one joins the receiver with the conversion kit's rifle stock, the 21-inch barrel, and the rifle fore-end, the product is a carbine rifle with a 21-inch barrel. If, however, the shorter, pistol-length barrel is not removed from the receiver when the rifle stock is added, one is left with a 10-inch or "short-barreled" carbine rifle. The entire conversion, from pistol to long-barreled rifle takes only a few minutes; conversion to a short-barreled rifle takes even less time.

In 1985, the Bureau of Alcohol, Tobacco and Firearms advised Thompson/Center that when its conversion kit was possessed or distributed together with the Contender pistol, the unit constituted a firearm subject to the NFA. Thompson/Center responded by paying the $200 tax for a single such firearm, and submitting an application for permission under 26 U. S. C. § 5822 "to make, use, and segregate as a single unit" a package consisting of a serially numbered pistol, together with an attachable shoulder stock and a 21-inch barrel. Thompson/Center then filed a refund claim. After more than six months had elapsed without action on it, the company brought this suit in the United States Claims Court under the Tucker Act, 28 U. S. C. § 1491, arguing that the unit registered was not a firearm within the meaning of the NFA because Thompson/Center had not assembled a short-barreled rifle from its components. The Claims Court

entered summary judgment for the Government, concluding that the Contender pistol together with its conversion kit is a firearm within the meaning of the NFA. 19 Cl. Ct. 725 (1990).

The Court of Appeals for the Federal Circuit reversed, holding that a short-barreled rifle "actually must be assembled" in order to be "made" within the meaning of the NFA. 924 F. 2d 1041, 1043 (1991). The Court of Appeals expressly declined to follow the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Drasen*, 845 F. 2d 731, cert. denied, 488 U. S. 909 (1988), which had held that an unassembled "complete parts kit" for a short-barreled rifle was in fact a short-barreled rifle for purposes of the NFA. We granted certiorari to resolve this conflict. 502 U. S. 807 (1991).

II

The NFA provides that "[t]he term 'make', and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm." 26 U. S. C. § 5845(i).[2] But the provision does not expressly address the question whether a short-barreled rifle can be "made" by the aggregation of finished parts that can readily be assembled into one. The Government contends that assembly is not necessary; Thompson/Center argues that it is.

A

The Government urges us to view the shipment of the pistol with the kit just as we would the shipment of a bicycle

[2]The phrase "other than by one qualified to engage in such business under this chapter" apparently refers to those manufacturers who have sought and obtained qualification as a firearms manufacturer under 26 U. S. C. § 5801(a)(1), which requires payment of a $1,000 occupational tax. Rather than seek such qualification, Thompson/Center applied for permission to make a firearm as a nonqualified manufacturer under § 5822, which requires payment of the $200 per firearm "making tax" under § 5821(a).

that requires some home assembly. "The fact that a short-barrel rifle, or any other 'firearm,' is possessed or sold in a partially unassembled state does not remove it from regulation under the Act." Brief for United States 6.

The Government's analogy of the partially assembled bicycle to the packaged pistol and conversion kit is not, of course, exact. While each example includes some unassembled parts, the crated bicycle parts can be assembled into nothing but a bicycle, whereas the contents of Thompson/Center's package can constitute a pistol, a long-barreled rifle, or a short-barreled version. These distinctions, however, do define the issues raised by the Government's argument, the first of which is whether the aggregation and segregation of separate parts that can be assembled only into a short-barreled rifle and are sufficient for that purpose amount to "making" that firearm, or whether the firearm is not "made" until the moment of final assembly. This is the issue on which the Federal and Seventh Circuits are divided.

We think the language of the statute provides a clear answer on this point. The definition of "make" includes not only "putting together," but also "manufacturing . . . or otherwise producing a firearm." If as Thompson/Center submits, a firearm were only made at the time of final assembly (the moment the firearm was "put together"), the additional language would be redundant. Congress must, then, have understood "making" to cover more than final assembly, and some disassembled aggregation of parts must be included. Since the narrowest example of a combination of parts that might be included is a set of parts that could be used to make nothing but a short-barreled rifle, the aggregation of such a set of parts, at the very least, must fall within the definition of "making" such a rifle.

This is consistent with the holdings of every Court of Appeals, except the court below, to consider a combination of parts that could only be assembled into an NFA-regulated

firearm, either under the definition of rifle at issue here or under similar statutory language. See *United States* v. *Drasen, supra; United States* v. *Endicott*, 803 F. 2d 506, 508–509 (CA9 1986) (unassembled silencer is a silencer); *United States* v. *Luce*, 726 F. 2d 47, 48–49 (CA1 1984) (same); *United States* v. *Lauchli*, 371 F. 2d 303, 311–313 (CA7 1966) (unassembled machineguns are machineguns).[3] We thus reject the broad language of the Court of Appeals for the Federal Circuit to the extent that it would mean that a disassembled complete short-barreled rifle kit must be assembled before it has been "made" into a short-barreled rifle. The fact that the statute would serve almost no purpose if this were the rule only confirms the reading we have given it.[4]

We also think that a firearm is "made" on facts one step removed from the paradigm of the aggregated parts that can be used for nothing except assembling a firearm. Two courts to our knowledge have dealt in some way with claims that when a gun other than a firearm was placed together

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[3] In *Drasen*, a complete-parts kit was sold with a flash suppressor, which, if affixed to the rifle barrel, would have extended it beyond the regulated length. See *Drasen*, 845 F. 2d, at 737. Because the *Drasen* court concluded that such a flash suppressor was not a part of the rifle's barrel, see *ibid.*, its holding is consistent with ours.

[4] We do not accept the Government's suggestion, however, that complete-parts kits must be taxable because otherwise manufacturers will be able to "avoid the tax." Brief for United States 11. Rather, we conclude that such kits are within the definition of the taxable item. Failure to pay the tax on such a kit thus would amount to evasion, not avoidance. In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right. "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant." *Commissioner* v. *Newman*, 159 F. 2d 848, 850–851 (CA2) (L. Hand, J., dissenting), cert. denied, 331 U. S. 859 (1947).

with a further part or parts that would have had no use in association with the gun except to convert it into a firearm, a firearm was produced. See *United States* v. *Kokin*, 365 F. 2d 595, 596 (CA3) (carbine together with all parts necessary to convert it into a machinegun is a machinegun), cert. denied, 385 U. S. 987 (1966); see also *United States* v. *Zeidman*, 444 F. 2d 1051, 1053 (CA7 1971) (pistol and attachable shoulder stock found "in different drawers of the same dresser" constitute a short-barreled rifle). Here it is true, of course, that some of the parts could be used without ever assembling a firearm, but the likelihood of that is belied by the utter uselessness of placing the converting parts with the others except for just such a conversion. Where the evidence in a given case supports a finding of such uselessness, the case falls within the fair intendment of "otherwise producing a firearm." See 26 U. S. C. § 5845(i).[5]

B

Here, however, we are not dealing with an aggregation of parts that can serve no useful purpose except the assembly

[5] Contrary to JUSTICE SCALIA's suggestion, see *post*, at 522, our understanding of these aggregations of parts, shared by a majority of the Court (those who join this opinion and the four Members of the Court in dissent, see *post*, p. 523 (WHITE, J., joined by BLACKMUN, STEVENS, and KENNEDY, JJ., dissenting) (*any* aggregation of parts necessary to assemble a firearm is a firearm)), applies to all the provisions of the Act, whether they regulate the "making" of a firearm, *e. g.*, 26 U. S. C. § 5821(a), or not, see, *e. g.*, § 5842(b) (possession of a firearm that has no serial number); § 5844 (importation of a firearm); § 5811 (transfer of a firearm). Since, as we conclude, such a combination of parts, or of a complete gun and an additional part or parts, is "made" into a firearm, it follows, in the absence of some reason to the contrary, that all portions of the Act that apply to "firearms" apply to such a combination. JUSTICE SCALIA does not explain how we would be free to construe "firearm" in a different way for purposes of those provisions that do not contain the verb "to make." Our normal canons of construction caution us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute.

of a firearm, or with an aggregation having no ostensible utility except to convert a gun into such a weapon. There is, to be sure, one resemblance to the latter example in the sale of the Contender with the converter kit, for packaging the two has no apparent object except to convert the pistol into something else at some point. But the resemblance ends with the fact that the unregulated Contender pistol can be converted not only into a short-barreled rifle, which is a regulated firearm, but also into a long-barreled rifle, which is not. The packaging of pistol and kit has an obvious utility for those who want both a pistol and a regular rifle, and the question is whether the mere possibility of their use to assemble a regulated firearm is enough to place their combined packaging within the scope of "making" one.[6]

1

Neither the statute's language nor its structure provides any definitive guidance. Thompson/Center suggests guidance may be found in some subsections of the statute governing other types of weapons by language that expressly covers combinations of parts. The definition of "machinegun," for example, was amended by the Gun Control Act of

[6] Thompson/Center suggests that further enquiry could be avoided when it contends that the Contender and carbine kit do not amount to a "rifle" of any kind because, until assembled into a rifle, they are not "'made' and 'intended to be fired from the shoulder.'" Brief for Respondent 8. From what we have said thus far, however, it is apparent that, though disassembled, the parts included when the Contender and its carbine kit are packaged together have been "made" into a rifle. The inclusion of the rifle stock in the package brings the Contender and carbine kit within the "intended to be fired from the shoulder" language contained in the definition of rifle in the statute. See 26 U. S. C. § 5845(c). The only question is whether this combination of parts constitutes a short-barreled rifle. Surely JUSTICE SCALIA's argument would take us over the line between lenity and credulity when he suggests that one who makes what would otherwise be a short-barreled rifle could escape liability by carving a warning into the shoulder stock. See *post*, at 523 (SCALIA, J., concurring in judgment).

1968 to read that "[t]he term shall also include . . . any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U. S. C. § 5845(b).[7] In 1986, the definition of "silencer" was amended by the Firearms Owners' Protection Act to "includ[e] any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer . . . ." See 26 U. S. C. § 5845(a)(7); 18 U. S. C. § 921(a)(24).

Thompson/Center stresses the contrast between these references to "any combination of parts" and the silence about parts in the definition of rifle in arguing that no aggregation of parts can suffice to make the regulated rifle. This argument is subject to a number of answers, however. First, it sweeps so broadly as to conflict with the statutory definition of "make," applicable to all firearms, which implies that a firearm may be "made" even where not fully "put together." If this were all, of course, the conflict might well be resolved in Thompson/Center's favor. We do not, however, read the machinegun and silencer definitions as contrasting with the definition of rifle in such a way as to raise a conflict with the broad concept of "making."

The definition of "silencer" is now included in the NFA only by reference, see 26 U. S. C. § 5845(a)(7), whereas its text appears only at 18 U. S. C. § 921(a)(24), in a statute that itself contains no definition of "make." Prior to 1986 the definition of "firearm" in the NFA included "a muffler or a silencer for any firearm whether or not such firearm is included within this definition." 26 U. S. C. § 5845(a)(7) (1982 ed.). Two Courts of Appeals held this language to include

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[7] At the same time, the definition of "destructive device" was amended to include "any combination of parts either designed or intended for use in converting any device into a destructive device . . . and from which a destructive device may readily be assembled." 26 U. S. C. § 5845(f). This appears to envision by its terms only combinations of parts for converting something into a destructive device.

unassembled silencers that could be readily and easily assembled. See *United States* v. *Endicott*, 803 F. 2d, at 508–509; *United States* v. *Luce*, 726 F. 2d, at 48–49.

In 1986, Congress replaced that language with "any silencer (as defined in section 921 of title 18, United States Code)." Pub. L. 99–308, § 109(b), 100 Stat. 460. The language defining silencer that was added to 18 U. S. C. § 921 at that same time reads: "The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication." Pub. L. 99–308, § 101, 100 Stat. 451.

Thompson/Center argues that if, even before the amendment, a combination of parts was already "made" into a firearm, the "any combination of parts" language would be redundant. While such a conclusion of redundancy could suggest that Congress assumed that "make" in the NFA did not cover unassembled parts, the suggestion (and the implied conflict with our reading of "make") is proven false by evidence that Congress actually understood redundancy to result from its new silencer definition. Congress apparently assumed that the statute reached complete-parts kits even without the "combination" language and understood the net effect of the new definition as expanding the coverage of the Act beyond complete-parts kits. "The definition of silencer is amended to include any part designed or redesigned and intended to be used as a silencer for a firearm. This will help to control the sale of incomplete silencer kits that now circumvent the prohibition on selling complete kits." H. R. Rep. No. 99–495, p. 21 (1986). Because the addition of the "combination of parts" language to the definition of silencer does not, therefore, bear the implication Thompson/Center

would put on it, that definition cannot give us much guidance in answering the question before us.[8]

We get no more help from analyzing the machinegun definition's reference to parts. It speaks of "any combination" of them in the possession or control of any one person. Here the definition sweeps broader than the aggregation of parts clearly covered by "making" a rifle. The machinegun parts need not even be in any particular proximity to each other. There is thus no conflict between definitions, but neither is much light shed on the limits of "making" a short-barreled rifle. We can only say that the notion of an unassembled machinegun is probably broader than that of an unassembled rifle. But just where the line is to be drawn on short-barreled rifles is not demonstrated by textual considerations.

2

Thompson/Center also looks for the answer in the purpose and history of the NFA, arguing that the congressional purpose behind the NFA, of regulating weapons useful for criminal purposes, should caution against drawing the line in such a way as to apply the Act to the Contender pistol and carbine kit. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A395 (1954) (the adoption of the original definition of rifle was intended to preclude coverage of antique guns held by collec-

[8] JUSTICE SCALIA upbraids us for reliance on legislative history, his "St. Jude of the hagiology of statutory construction." *Post*, at 521. The shrine, however, is well peopled (though it has room for one more) and its congregation has included such noted elders as Justice Frankfurter: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning." *United States* v. *Monia*, 317 U. S. 424, 432 (1943) (dissenting opinion).

tors, "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons, except pistols and revolvers, as could be used readily and efficiently by criminals or gangsters").

It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short-barreled rifles, for example, addresses a concealable weapon likely to be so used. But when Thompson/Center urges us to recognize that "the Contender pistol and carbine kit is not a criminal-type weapon," Brief for Respondent 20, it does not really address the issue of where the line should be drawn in deciding what combinations of parts are "made" into short-barreled rifles. Its argument goes to the quite different issue whether the single-shot Contender should be treated as a firearm within the meaning of the Act even when assembled with a rifle stock.

Since Thompson/Center's observations on this extraneous issue shed no light on the limits of unassembled "making" under the Act, we will say no more about congressional purpose. Nor are we helped by the NFA's legislative history, in which we find nothing to support a conclusion one way or the other about the narrow issue presented here.

III

After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute. The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness. Cf. *Cheek* v. *United States*, 498 U. S. 192, 200 (1991) ("Congress has . . . softened the impact of the common-law presumption [that ignorance of the law is no defense to criminal prosecution] by making specific intent to violate the law an element of certain federal criminal

tax offenses"); 26 U. S. C. §§ 7201, 7203 (criminalizing willful evasion of taxes and willful failure to file a return). Making a firearm without approval may be subject to criminal sanction, as is possession of an unregistered firearm and failure to pay the tax on one, 26 U. S. C. §§ 5861, 5871. It is proper, therefore, to apply the rule of lenity and resolve the ambiguity in Thompson/Center's favor. See *Crandon* v. *United States*, 494 U. S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action); *Commissioner* v. *Acker*, 361 U. S. 87, 91 (1959).[9] Accordingly, we conclude that the Contender pistol and carbine kit when packaged together by Thompson/Center have not been "made" into a short-barreled rifle for purposes of the NFA.[10] The judgment of the Court of Appeals is therefore

Affirmed.

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[9] The Government has urged us to defer to an agency interpretation contained in two longstanding Revenue Rulings. Even if they were entitled to deference, neither of the rulings, Rev. Rul. 61–45, 1961–1 Cum. Bull. 663, and Rev. Rul. 61–203, 1961–2 Cum. Bull. 224 (same), goes to the narrow question presented here, addressing rather the question whether pistols with short barrels and attachable shoulder stocks are short-barreled rifles. We do not read the Government to be relying upon Rev. Rul. 54–606, 1954–2 Cum. Bull. 33, which was repealed as obsolete in 1972, Rev. Rul. 72–178, 1972–1 Cum. Bull. 423, and which contained broader language that "possession or control of sufficient parts to assemble an operative firearm . . . constitutes the possession of a firearm." Reply Brief for United States 10.

[10] JUSTICE STEVENS contends that lenity should not be applied because this is a "'tax statute,'" *post*, at 526, rather than a "criminal statute," see *post*, at 525, n. 1, quoting *Crandon* v. *United States*, 494 U. S. 152, 168 (1990). But this tax statute has criminal applications, and we know of no other basis for determining when the essential nature of a statute is "criminal." Surely, JUSTICE STEVENS cannot mean to suggest that in order for the rule of lenity to apply, the statute must be contained in the Criminal Code. See, *e. g.*, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952) (construing the criminal provisions of the Fair Labor Standards Act, 29 U. S. C. §§ 215, 216(a)). JUSTICE STEVENS further suggests that lenity is inappropriate because we construe the statute today

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I agree with the plurality that the application of the National Firearms Act (NFA) to Thompson/Center's pistol and conversion kit is sufficiently ambiguous to trigger the rule of lenity, leading to the conclusion that the kit is not covered. I disagree with the plurality, however, over where the ambiguity lies—a point that makes no difference to the outcome here, but will make considerable difference in future cases. The plurality thinks the ambiguity pertains to whether the making of a regulated firearm includes (i) the manufacture of parts kits that can possibly be used to assemble a regulated firearm, or rather includes only (ii) the manufacture of parts kits that serve no useful purpose except assembly of a regulated firearm. *Ante*, at 512–513, 517. I think the ambiguity pertains to the much more fundamental point of whether the making of a regulated firearm includes the manufacture, without assembly, of component parts where the definition of the particular firearm does not so indicate.

As JUSTICE WHITE points out, the choice the plurality worries about is nowhere suggested by the language of the statute: § 5845 simply makes no reference to the "'utility'" of aggregable parts. *Post*, at 524 (dissenting opinion). It *does*, however, conspicuously combine references to "combination of parts" in the definitions of regulated silencers, machineguns, and destructive devices with the absence of any such reference in the definition of regulated rifles. This, rather than the utility or not of a given part in a given parts assemblage, convinces me that the provision does not encom-

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"'in a civil setting,'" rather than a "criminal prosecution." *Post*, at 526. The rule of lenity, however, is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.

pass Thompson/Center's pistol and conversion kit, or at least does not do so unambiguously.

The plurality reaches its textually uncharted destination by determining that the statutory definition of "make," the derivative of which appears as an operative word in 26 U. S. C. §5821 ("There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of $200 for each firearm made"), covers the making of parts that, assembled, are firearms. Noting that the "definition of 'make' includes not only 'putting together,' but also 'manufacturing . . . or otherwise producing a firearm,'" the plurality reasons that if "a firearm were only made at the time of final assembly (the moment the firearm was 'put together'), the additional language would be redundant." *Ante*, at 510.

This reasoning seems to me mistaken. I do not think that if "making" requires "putting together," other language of the definition section ("manufacturing" and "otherwise producing") becomes redundant. "Manufacturing" is qualified by the parenthetical phrase "(other than by one qualified to engage in such business under this chapter)," whereas "putting together" is not. Thus, one who assembles a firearm *and also engages in the prior activity of producing the component parts* can be immunized from being considered to be making firearms by demonstrating the relevant qualification, whereas one who merely assembles parts manufactured by others cannot. Recognition of this distinction is alone enough to explain the separate inclusion of "putting together," even though "manufacturing" itself includes assembly. As for the phrase "otherwise producing," that may well be redundant, but such residual provisions often are. They are often meant for insurance, to cover anything the draftsman might inadvertently have omitted in the antecedent catalog; and if the draftsman is good enough, he will have omitted nothing at all. They are a prime example of provisions in which "iteration is obviously afoot," *Moskal* v. *United States*, 498 U. S. 103, 120 (1990) (SCALIA, J., dissenting), and

for which an inflexible rule of avoiding redundancy will produce disaster. In any event, the plurality's own interpretation (whereby "manufacturing" a firearm does not require assembling it, and "putting together" is an entirely separate category of "making") renders it not a bit easier to conceive of a nonredundant application for "otherwise producing."

The plurality struggles to explain why its interpretation ("making" does not require assembly of component parts) does not *itself* render redundant the "combination of parts" language found elsewhere in 26 U. S. C. § 5845, in the definitions of machinegun and destructive device, §§ 5845(b) and (f), and in the incorporated-by-reference definition of silencer, § 5845(a)(7) (referring to 18 U. S. C. § 921). See *ante*, at 513–516. I do not find its explanations persuasive, particularly that with respect to silencer, which resorts to that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history. As I have said before, reliance on that source is particularly inappropriate in determining the meaning of a statute with criminal application. *United States* v. *R. L. C.*, 503 U. S. 291, 307 (1992) (opinion concurring in part and concurring in judgment).

There is another reason why the plurality's interpretation is incorrect: It determines what constitutes a regulated "firearm" via an operative provision of the NFA (here § 5821, the *making* tax) rather than by way of § 5845, which defines firearms covered by the chapter. With respect to the definitions of machineguns, destructive devices, and silencers, for instance, the reference to "combination of parts" causes parts aggregations to be firearms *whenever* those nouns are used, and not just when they are used in conjunction with the verb "make" and its derivatives. Thus, the restrictions of § 5844, which regulate the importation of "firearm[s]" (a term defined to include "machinegun[s]," see § 5845(a)(6)), apply to a "combination of parts from which a machinegun can be assembled" (because that is part of the *definition* of

machinegun) *even though* the word "make" and its derivatives do not appear in § 5844. This demonstrates, I say, the error of the plurality's interpretation, because it makes no sense to have the firearms regulated by the NFA bear one identity (which includes *components* of rifles and shotguns) when they are the object of the verb "make," and a different identity (excluding such components) when they are not. Section 5842(a), for example, requires anyone "making" a firearm to identify it with a serial number that may not be readily removed; § 5842(b) requires any person who "possesses" a firearm lacking the requisite serial number to identify it with one assigned by the Secretary of the Treasury. Under the plurality's interpretation, all the firearms covered by (a) are not covered by (b), since a person who "possesses" the components for a rifle or shotgun does not possess a firearm, even though a person who "makes" the components for a rifle or shotgun makes a firearm. For similar reasons, the tax imposed on "the making of a firearm" by § 5821 would apply to the making of components for rifles and shotguns, but the tax imposed on "firearms transferred" by § 5811 would not apply to the transfer of such components. This cannot possibly be right.*

Finally, even if it were the case that unassembled parts could constitute a rifle, I do not think it was established in

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*The plurality, as I read its opinion, relies on the derivative of "make" that appears in § 5821, not that appearing (in a quite different context) in the definition of "rifle." See 26 U. S. C. § 5845(c) ("The term 'rifle' means a weapon designed or redesigned, made or remade . . ."). I think it would not be possible to rely upon the use of "made" in § 5845(c), where the context is obviously suggestive of assembled rather than unassembled rifles. But even if the plurality means to apply its interpretation of "make" to § 5845(c), it still does not entirely avoid the problem I have identified. The definition of "any other weapon," another in § 5845's arsenal of defined firearms, does not contain relevant uses of the verb "make" or any derivative thereof. See 26 U. S. C. § 5845(e). It necessarily follows that "any other weapon" will mean one thing when a making tax is at hand but something else when a transfer tax is.

this case that respondent manufactured (assembled or not) a rifle "having a barrel or barrels of less than 16 inches in length," which is what the definition of "firearm" requires, § 5845(a)(3). For the definition of "rifle" requires that it be "intended to be fired from the shoulder," § 5845(c), and the only combination of parts so intended, as far as respondent is concerned (and the record contains no indication of anyone else's intent), is the combination that forms a rifle with a 21-inch barrel. The kit's instructions emphasized that legal sanctions attached to the unauthorized making of a short-barreled rifle, and there was even carved into the shoulder stock itself the following: "WARNING. FEDERAL LAW PROHIBITS USE WITH BARREL LESS THAN 16 INCHES."

Since I agree (for a different reason) that the rule of lenity prevents these kits from being considered firearms within the meaning of the NFA, I concur in the judgment of the Court.

JUSTICE WHITE, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY join, dissenting.

The Court of Appeals for the Federal Circuit concluded that, to meet the definition of "firearm" under the National Firearms Act (NFA), 26 U. S. C. § 5845(a)(3), "a short-barreled rifle actually must be assembled." 924 F. 2d 1041, 1043 (1991) (footnote omitted). I agree with the plurality that this pinched interpretation of the statute would fail to accord the term "make" its full meaning as that term is defined, § 5845(i), and used in the definition of the term "rifle," § 5845(c). Because one "makes" a firearm not only in the actual "putting together" of the parts, but also by "manufacturing . . . or otherwise producing a firearm," Congress clearly intended that the "making" include a "disassembled aggregation of parts," *ante*, at 510, where the assemblage of such parts results in a firearm. In short, when the components necessary to assemble a rifle are produced and held in

conjunction with one another, a "rifle" is, not surprisingly, the result.

This was the difficult issue presented by this case, and its resolution, for me, is dispositive, as respondent Thompson/Center concedes that it manufactures and distributes together a collection of parts that may be readily assembled into a short-barreled rifle. Indeed, Thompson/Center's argument concerning statutory construction, as well as its appeal to the rule of lenity, does not suggest, nor does any case brought to our attention, that one may escape the tax and registration requirements the NFA imposes on those who "make" regulated rifles simply by distributing as part of the package other interchangeable pieces of sufficient design to avoid the regulated definition. The plurality nevertheless draws an artificial line between, on the one hand, those parts that "can serve no useful purpose except the assembly of a firearm" or that have "no ostensible utility except to convert a gun into such a weapon," and, on the other hand, those parts that have "an obvious utility for those who want both a pistol and a regular rifle." *Ante*, at 512–513.

I cannot agree. Certainly the statute makes no distinction based on the "utility" of the extra parts. While the plurality prefers to view this silence as creating ambiguity, I find it only to signal that such distinctions are irrelevant. To conclude otherwise is to resort to "'ingenuity to create ambiguity'" that simply does not exist in this statute. *United States* v. *James*, 478 U. S. 597, 604 (1986), quoting *Rothschild* v. *United States*, 179 U. S. 463, 465 (1900). As noted by the Government, when a weapon comes within the scope of the "firearm" definition, the fact that it may also have a nonregulated form provides no basis for failing to comply with the requirements of the NFA. Brief for United States 13–14.

The Court today thus closes one loophole—one cannot circumvent the NFA simply by offering an unassembled collection of parts—only to open another of equal dimension—one

can circumvent the NFA by offering a collection of parts that can be made either into a "firearm" or an unregulated rifle. I respectfully dissent.

JUSTICE STEVENS, dissenting.

If this were a criminal case in which the defendant did not have adequate notice of the Government's interpretation of an ambiguous statute, then it would be entirely appropriate to apply the rule of lenity.[1] I am persuaded, however, that the Court has misapplied that rule to this quite different case.

I agree with JUSTICE WHITE, see *ante*, at 523–524, and also with the plurality, see *ante*, at 511, that respondent has made a firearm even though it has not assembled its constituent parts. I also agree with JUSTICE WHITE that that should be the end of the case, see *ante*, at 524, and therefore, I join his opinion. I add this comment, however, because I am persuaded that the Government should prevail even if the statute were ambiguous.

The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.[2] The

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[1] See, *e. g.*, *Crandon* v. *United States*, 494 U. S. 152, 168 (1990) ("Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of [18 U. S. C.] § 209(a) remains, it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent"); *Commissioner* v. *Acker*, 361 U. S. 87, 91 (1959) ("The law is settled that 'penal statutes are to be construed strictly,' . . . and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it' ") (citations omitted).

[2] Ambiguity in a *criminal* statute is resolved in favor of the defendant because " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' " and because "of the seriousness of criminal penalties, and because criminal punishment usually represents the moral con-

risk that this respondent would be the victim of such unfairness, is, however, extremely remote. In 1985, the Government properly advised respondent of its reading of the statute and gave it ample opportunity to challenge that reading in litigation in which nothing more than tax liability of $200 was at stake. See 924 F. 2d 1041, 1042–1043 (CA Fed. 1991). Moreover, a proper construction of the statute in this case would entirely remove the risk of criminal liability in the future.

The plurality, after acknowledging that this case involves "a tax statute" and its construction "in a civil setting," *ante*, at 517, nevertheless proceeds to treat the case as though it were a criminal prosecution. In my view, the Court should approach this case like any other civil case testing the Government's interpretation of an important regulatory statute. This statute serves the critical objective of regulating the manufacture and distribution of concealable firearms—dangerous weapons that are a leading cause of countless crimes that occur every day throughout the Nation. This is a field that has long been subject to pervasive governmental regulation because of the dangerous nature of the product and the public interest in having that danger controlled.[3] The public interest in carrying out the purposes that motivated the enactment of this statute is, in my judgment and on this record, far more compelling than a mechanical application of the rule of lenity.

Accordingly, for this reason, as well as for the reasons stated by JUSTICE WHITE, I respectfully dissent.

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demnation of the community, [and therefore] legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U. S. 336, 348 (1971).

[3] See, *e. g.*, Gun Control Act of 1968, 18 U. S. C. § 921 *et seq.*; Arms Export Control Act, as amended Pub. L. 94–329, 90 Stat. 744, 22 U. S. C. § 2778; *United States* v. *Biswell*, 406 U. S. 311, 316 (1972) (acknowledging that the sale of firearms is a "pervasively regulated business").

Syllabus

SOCHOR *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 91–5843. Argued March 2, 1992—Decided June 8, 1992

After a Florida jury found petitioner Sochor guilty of capital murder, the jury was instructed at the penalty hearing on the possibility of finding four aggravating factors, including the State's "heinousness" and "coldness" factors. The jury was also charged with weighing any mitigating circumstances it might find against the aggravating ones in reaching an advisory verdict as to whether Sochor's sentence should be life imprisonment or death. The jury's recommendation of death was adopted by the trial court, which found all four aggravating circumstances defined in the jury instructions and no mitigating circumstances. The State Supreme Court held, among other things, that the question whether the jury instruction on the heinousness factor was unconstitutionally vague had been waived for failure to object. The court also held that the evidence failed to support the trial judge's finding of the coldness factor, but nevertheless affirmed the death sentence.

Held:

1. The application of the heinousness factor to Sochor did not result in reversible error. Pp. 532–537.

(a) In a weighing State like Florida, Eighth Amendment error occurs when the sentencer weighs an "invalid" aggravating factor in reaching the decision to impose a death sentence. See *Clemons* v. *Mississippi*, 494 U. S. 738, 752. While federal law does not require the state appellate court reviewing such error to remand for resentencing, the court must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. See, *e. g.*, *Parker* v. *Dugger*, 498 U. S. 308, 321. P. 532.

(b) This Court lacks jurisdiction to address Sochor's claim that the jury instruction on the heinousness factor was unconstitutionally vague. The State Supreme Court indicated with requisite clarity that its rejection of the claim was based on an alternative state ground, see, *e. g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1041, and Sochor has said nothing to persuade the Court that this state ground is either not adequate or not independent, see *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126. Pp. 533–534.

(c) No Eighth Amendment violation occurred when the trial judge weighed the heinousness factor. Although the State Supreme Court's recent decisions may have evinced inconsistent and overbroad constructions of the heinousness factor that leave trial judges without sufficient

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guidance in other factual situations, that court has consistently held that heinousness is properly found where, as here, the defendant strangled a conscious victim. Under *Walton* v. *Arizona*, 497 U. S. 639, 653, it must be presumed that the trial judge in the case at hand was familiar with this body of case law, which, at a minimum, gave the judge "some guidance," *id.*, at 654. This is all that the Eighth Amendment requires. Pp. 535–537.

2. The application of the coldness factor to Sochor constituted Eighth Amendment error that went uncorrected in the State Supreme Court. Pp. 538–541.

(a) Sochor's claim that an Eighth Amendment violation occurred when the jury "weighed" the coldness factor is rejected. Because, under Florida law, the jury does not reveal the aggravating factors on which it relies, it cannot be known whether the jury actually relied on the coldness factor here. This Court will not presume that a general verdict rests on a ground that the evidence does not support. *Griffin* v. *United States*, 502 U. S. 46, 59–60. P. 538.

(b) However, Eighth Amendment error occurred when the trial judge weighed the coldness factor. In Florida, the judge is at least a constituent part of the "sentencer" for *Clemons* purposes, and there is no doubt that the judge "weighed" the coldness factor in this case. Nor is there any question that the factor was "invalid" for *Clemons* purposes, since the State Supreme Court found it to be unsupported by the evidence. See *Parker*, *supra*, at 311. Pp. 538–539.

(c) The State Supreme Court did not cure the Eighth Amendment error. That court generally does not reweigh evidence independently. See, *e. g.*, *Parker*, *supra*, at 319. Nor did that court support the death verdict by performing harmless-error analysis, since its opinion fails to mention "harmless error" and expressly refers to the quite different enquiry whether Sochor's sentence was proportional, and since only one of the four cases cited by the court contained explicit harmless-error language. Pp. 539–540.

580 So. 2d 595, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, Part I of which was unanimous, Part II of which was joined by REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., Part III–A of which was joined by REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, and THOMAS, JJ., Part III–B–1 of which was joined by REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and THOMAS, JJ., and Parts III–B–2 and IV of which were joined by BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ. O'CONNOR, J., filed a concurring opinion, *post*, p. 541. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which WHITE and THOMAS, JJ., joined, *post*, p. 541.

STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, *post*, p. 545. SCALIA, J., filed an opinion concurring in part and dissenting in part, *post*, p. 553.

Gary Caldwell argued the cause for petitioner. With him on the briefs were *Richard L. Jorandby* and *Eric Cumfer*.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for respondent. With her on the brief were *Robert A. Butterworth*, Attorney General, and *Celia A. Terenzio*, Assistant Attorney General.*

JUSTICE SOUTER delivered the opinion of the Court.

Under Florida law, after a defendant is found guilty of capital murder, a separate jury proceeding is held as the first of two steps in deciding whether his sentence should be life imprisonment or death. Fla. Stat. § 921.141(1) (1991). At the close of such aggravating and mitigating evidence as the prosecution and the defense may introduce, the trial judge charges the jurors to weigh whatever aggravating and mitigating circumstances or factors they may find, and to reach an advisory verdict by majority vote. § 921.141(2). The jury does not report specific findings of aggravating and mitigating circumstances, but if, at the second sentencing step, the judge decides upon death, he must issue a written statement of the circumstances he finds. § 921.141(3). A death sentence is then subject to automatic review by the Supreme Court of Florida. § 921.141(4).

A Florida trial court sentenced petitioner to death after a jury so recommended, and the Supreme Court of Florida affirmed. We must determine whether, as petitioner claims, the sentencer in his case weighed either of two aggravating factors that he claims were invalid, and if so, whether the State Supreme Court cured the error by holding it harmless.

**Steven M. Goldstein* filed a brief for the Volunteer Lawyers Resource Center of Florida, Inc., as *amicus curiae* urging reversal.

Michael Mello filed a brief for the Capital Collateral Representative of the State of Florida as *amicus curiae*.

We answer yes to the first question and no to the second, and therefore vacate the judgment of the Supreme Court of Florida and remand.

I

On New Year's Eve 1981, petitioner Dennis Sochor met a woman in a bar in Broward County, Florida. Sochor tried to rape her after they had left together, and her resistance angered him to the point of choking her to death. He was indicted for first-degree murder and kidnaping and, after a jury trial, was found guilty of each offense.

At the penalty hearing, aggravating and mitigating evidence was offered, and the jury was instructed on the possibility of finding four aggravating circumstances, two of which were that

> "the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel, and [that] the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." App. 326–327.

The judge then explained to the jury that it could find certain statutory and any nonstatutory mitigating circumstances, which were to be weighed against any aggravating ones. By a vote of 10 to 2, the jury recommended the death penalty for the murder. The trial court adopted the jury's recommendation, finding all four aggravating circumstances as defined in the jury instructions and no circumstances in mitigation.

The Supreme Court of Florida affirmed. 580 So. 2d 595 (1991). It declined to reverse for unconstitutional vagueness in the trial judge's instruction that the jury could find as an aggravating factor that "the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (hereinafter, for brevity, the heinousness factor, after the statute's words "heinous, atrocious, or

cruel," Fla. Stat. § 921.141(5)(h) (1991)). The court held the issue waived for failure to object and the claim lacking merit in any event. 580 So. 2d, at 602–603, and n. 10. The court also rejected Sochor's claim of insufficient evidence to support the trial judge's finding of the heinousness factor, citing evidence of the victim's extreme anxiety and fear before she died. The State Supreme Court did agree with Sochor, however, that the evidence failed to support the trial judge's finding that "the crime . . . was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification" (hereinafter the coldness factor), holding this factor to require a "heightened" degree of premeditation not shown in this case. *Id.*, at 603. The State Supreme Court affirmed the death sentence notwithstanding the error, saying that:

> "[1] We . . . disagree with Sochor's claim that his death sentence is disproportionate. [2] The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. [3] Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. [4] Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991); *Holton v. State*, 573 So. 2d 284 (Fla. 1990); *James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 469 U. S. 1098 . . . (1984); *Francois v. State*, 407 So. 2d 885 (Fla. 1981), *cert. denied*, 458 U. S. 1122 . . . (1982). [5] Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime. *E. g., Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990); *Tompkins*[v. *State*, 502 So. 2d 415 (Fla. 1986), cert. denied, 483 U. S. 1033 (1987)]; *Doyle*[v. *State*, 460 So. 2d 353 (Fla. 1984)]." *Id.*, at 604.

Sochor petitioned for a writ of certiorari, raising four questions. We granted review limited to the following two: (1) "Did the application of Florida's [heinousness factor] violate the Eighth and Fourteenth Amendments?" and (2) "Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, [in that] the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?" Pet. for Cert. ii; see 502 U. S. 967 (1991).

II

In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See *Clemons* v. *Mississippi*, 494 U. S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," *Stringer* v. *Black*, 503 U. S. 222, 236 (1992), by placing a "thumb [on] death's side of the scale," *id.*, at 232, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," *id.*, at 235. Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, *supra*, at 752 (citing *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982)); see *Parker* v. *Dugger*, 498 U. S. 308, 321 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. *Id.*, at 320.

A

Florida's capital sentencing statute allows application of the heinousness factor if "[t]he capital felony was especially heinous, atrocious, or cruel." Fla. Stat. § 921.141(5)(h) (1991). Sochor first argues that the jury instruction on the heinousness factor was invalid in that the statutory definition is unconstitutionally vague, see *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), and the instruction failed to narrow the meaning enough to cure the defect. This error goes to the ultimate sentence, Sochor claims, because a Florida jury is "the sentencer" for *Clemons* purposes, or at the least one of "the sentencer's" constituent elements. This is so because the trial judge does not render wholly independent judgment, but must accord deference to the jury's recommendation. See *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975) (life verdict); *Grossman* v. *State*, 525 So. 2d 833, 839, n. 1 (Fla. 1988) (death verdict), cert. denied, 489 U. S. 1071 (1989). Hence, the argument runs, error at the jury stage taints a death sentence, even if the trial judge's decision is otherwise error free. Cf. *Baldwin* v. *Alabama*, 472 U. S. 372, 382 (1985). While Sochor concedes that the general advisory jury verdict does not reveal whether the jury did find and weigh the heinousness factor, he seems to argue that the possibility that the jury weighed an invalid factor is enough to require cure.

This argument faces a hurdle, however, in the rule that this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, see *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945), as it will if the state court's opinion "indicates clearly and expressly" that the state ground is an alternative holding, see *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983); see also *Harris* v. *Reed*, 489 U. S. 255, 264, n. 10 (1989); *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935).

The Supreme Court of Florida said this about petitioner's claim that the trial judge's instruction on the heinousness factor was unconstitutional:

> "Sochor's next claim, regarding alleged errors in the penalty jury instructions, likewise must fail. None of the complained-of jury instructions were objected to at trial, and, thus, they are not preserved for appeal. *Vaught v. State*, 410 So. 2d 147 (Fla. 1982). In any event, Sochor's claims here have no merit.[10]
>
> "[10] . . . . We reject without discussion Sochor's . . . claims . . . that the instructions as to the aggravating factors of heinous, atrocious, or cruel and cold, calculated, and premeditated were improper . . . ."
>
> 580 So. 2d, at 602–603, and n. 10.

The quoted passage indicates with requisite clarity that the rejection of Sochor's claim was based on the alternative state ground that the claim was "not preserved for appeal," and Sochor has said nothing in this Court to persuade us that this state ground is either not adequate or not independent. Hence, we hold ourselves to be without authority to address Sochor's claim based on the jury instruction about the heinousness factor.*

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*JUSTICE STEVENS's dissenting conclusion that we do have jurisdiction, *post*, at 547–549, is mistaken. First, the suggestion that Sochor's pretrial motion objecting to the vagueness of Florida's heinousness factor preserved his objection to the heinousness instruction to the jury, *post*, at 547, ignores the settled rule of Florida procedure that, in order to preserve an objection, a party must object after the trial judge has instructed the jury. See, *e. g.*, *Harris* v. *State*, 438 So. 2d 787, 795 (Fla. 1983), cert. denied, 466 U. S. 963 (1984); *Vazquez* v. *State*, 518 So. 2d 1348, 1350 (Fla. App. 1987); *Walker* v. *State*, 473 So. 2d 694, 697–698 (Fla. App. 1985). While the rule is subject to a limited exception for an advance request for a specific jury instruction that is explicitly denied, see, *e. g.*, *State* v. *Heathcoat*, 442 So. 2d 955, 957 (Fla. 1983); *Buford* v. *Wainwright*, 428 So. 2d

B

Sochor maintains that the same Eighth Amendment violation occurred again when the trial judge, who both parties

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1389, 1390 (Fla.), cert. denied, 464 U. S. 956 (1983); *De Parias* v. *State*, 562 So. 2d 434, 435 (Fla. App. 1990), Sochor gets no benefit from this exception, because he never asked for a specific instruction.

Second, JUSTICE STEVENS states that "the Florida Supreme Court, far from providing us with a plain statement that petitioner's claim was procedurally barred, has merely said that the claim was not preserved for appeal, and has given even further indication that petitioner's claim was not procedurally barred by proceeding to the merits, albeit in the alternative." *Post*, at 547–548 (citations and internal quotation marks omitted). It is difficult to comprehend why the State Supreme Court's statement that "the claim was not preserved for appeal" would not amount to "a plain statement that petitioner's claim was procedurally barred," especially since there is no reason to believe that error of the kind Sochor alleged cannot be waived under Florida law, see this note, *infra*. It is even more difficult to comprehend why the fact that the State Supreme Court rested upon this state ground merely in the alternative would somehow save our jurisdiction. See *supra*, at 533.

Third, JUSTICE STEVENS suggests that, in holding Sochor's claim waived, the Supreme Court of Florida implied that the claim did not implicate "fundamental error," and that this in turn implied a rejection of Sochor's claim of "error," presumably because all federal constitutional error (or at least the kind claimed by Sochor) would automatically be "fundamental." *Post*, at 548–549. To say that this is "the most reasonable explanation," *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), of the court's summary statement that Sochor's claim was "not preserved for appeal," see 580 So. 2d, at 602–603, is an Olympic stretch, see *Harris* v. *Reed*, 489 U. S. 255, 274–276 (1989) (KENNEDY, J., dissenting). In any event, we know of no Florida authority supporting JUSTICE STEVENS's suggestion that all federal constitutional error (or even the kind claimed by Sochor) would be automatically "fundamental." Indeed, where, as here, valid aggravating factors would remain, instructional error involving another factor is not "fundamental." See *Occhicone* v. *State*, 570 So. 2d 902, 906 (Fla. 1990), cert. denied, 500 U. S. 938 (1991).

Finally, JUSTICE STEVENS's suggestion that the State waived its independent-state-ground defense, *post*, at 548–549, forgets that this defense goes to our jurisdiction and therefore cannot be waived. See *supra*, at 533.

agree is at least a constituent part of "the sentencer," weighed the heinousness factor himself. To be sure, Sochor acknowledges the rule in *Walton* v. *Arizona*, 497 U. S. 639 (1990), where we held it was no error for a trial judge to weigh an aggravating factor defined by statute with impermissible vagueness, when the State Supreme Court had construed the statutory language narrowly in a prior case. *Id.*, at 653. We presumed that the trial judge had been familiar with the authoritative construction, which gave significant guidance. *Ibid.* Sochor nonetheless argues that *Walton* is no help to the State, because Florida's heinousness factor has not been subjected to the limitation of a narrow construction from the State Supreme Court.

In *State* v. *Dixon*, 283 So. 2d 1 (1973), cert. denied, 416 U. S. 943 (1974), the Supreme Court of Florida construed the statutory definition of the heinousness factor:

> "It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d, at 9.

Understanding the factor, as defined in *Dixon*, to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), that the sentencer had adequate guidance. See *id.*, at 255–256 (opinion of Stewart, Powell, and STEVENS, JJ.).

Sochor contends, however, that the State Supreme Court's post-*Proffitt* cases have not adhered to *Dixon*'s limitation as

stated in *Proffitt*, but instead evince inconsistent and overbroad constructions that leave a trial court without sufficient guidance. And we may well agree with him that the Supreme Court of Florida has not confined its discussions on the matter to the *Dixon* language we approved in *Proffitt*, but has on occasion continued to invoke the entire *Dixon* statement quoted above, perhaps thinking that *Proffitt* approved it all. See, *e. g.*, *Porter* v. *State*, 564 So. 2d 1060 (1990), cert. denied, 498 U. S. 1110 (1991); *Cherry* v. *State*, 544 So. 2d 184, 187 (1989), cert. denied, 494 U. S. 1090 (1990); *Lucas* v. *State*, 376 So. 2d 1149, 1153 (1979).

But however much that may be troubling in the abstract, it need not trouble us here, for our review of Florida law indicates that the State Supreme Court has consistently held that heinousness is properly found if the defendant strangled a conscious victim. See *Hitchcock* v. *State*, 578 So. 2d 685, 692–693 (1990), cert. denied, 502 U. S. 912 (1991); *Holton* v. *State*, 573 So. 2d 284, 292 (1990); *Tompkins* v. *State*, 502 So. 2d 415, 421 (1986); *Johnson* v. *State*, 465 So. 2d 499, 507, cert. denied, 474 U. S. 865 (1985); *Adams* v. *State*, 412 So. 2d 850, cert. denied, 459 U. S. 882 (1982). Cf. *Rhodes* v. *State*, 547 So. 2d 1201, 1208 (1989) (strangulation of semiconscious victim not heinous); *Herzog* v. *State*, 439 So. 2d 1372 (1983) (same). We must presume the trial judge to have been familiar with this body of case law, see *Walton*, 497 U. S., at 653, which, at a minimum, gave the trial judge "[some] guidance," *id.*, at 654. Since the Eighth Amendment requires no more, we infer no error merely from the fact that the trial judge weighed the heinousness factor. While Sochor responds that the State Supreme Court's interpretation of the heinousness factor has left Florida trial judges without sufficient guidance in other factual situations, we fail to see how that supports the conclusion that the trial judge was without sufficient guidance in the case at hand. See generally *Maynard* v. *Cartwright*, 486 U. S., at 361–364.

III

Sochor also claims that when "the sentencer" weighed the coldness factor there was Eighth Amendment error that went uncorrected in the State Supreme Court.

A

First, Sochor complains of consideration of the coldness factor by the jury, the first step in his argument being that the coldness factor was "invalid" in that it was unsupported by the evidence; the second step, that the jury in the instant case "weighed" the coldness factor; and the third and last step, that in Florida the jury is at least a constituent part of "the sentencer" for *Clemons* purposes. The argument fails, however, for the second step is fatally flawed. Because the jury in Florida does not reveal the aggravating factors on which it relies, we cannot know whether this jury actually relied on the coldness factor. If it did not, there was no Eighth Amendment violation. Thus, Sochor implicitly suggests that, if the jury was allowed to rely on any of two or more independent grounds, one of which is infirm, we should presume that the resulting general verdict rested on the infirm ground and must be set aside. See *Mills* v. *Maryland*, 486 U. S. 367, 376–377 (1988); cf. *Stromberg* v. *California*, 283 U. S. 359, 368 (1931). Just this Term, however, we held it was no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not. See *Griffin* v. *United States*, 502 U. S. 46 (1991). We reasoned that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence. *Id.*, at 59–60. We see no occasion for different reasoning here, and accordingly decline to presume jury error.

B

Sochor next complains that Eighth Amendment error in the trial judge's weighing of the coldness factor was left uncured by the State Supreme Court.

1

We can start from some points of agreement. The parties agree that, in Florida, the trial judge is at least a constituent part of "the sentencer" for *Clemons* purposes, and there is, of course, no doubt that the trial judge "weighed" the coldness factor, as he said in his sentencing order. Nor is there any question that the coldness factor was "invalid" for *Clemons* purposes, since *Parker* applied the *Clemons* rule where a trial judge had weighed two aggravating circumstances that were invalid in the sense that the Supreme Court of Florida had found them to be unsupported by the evidence. See 498 U. S., at 311. It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case. What is in issue is the adequacy of the State Supreme Court's effort to cure the error under the rule announced in *Clemons*, that a sentence so tainted requires appellate reweighing or review for harmlessness.

2

We noted in *Parker* that the Supreme Court of Florida will generally not reweigh evidence independently, 498 U. S., at 319 (citing *Hudson* v. *State*, 538 So. 2d 829, 831 *(per curiam)*, cert. denied, 493 U. S. 875 (1989); *Brown* v. *Wainwright*, 392 So. 2d 1327, 1331–1332 (1981) *(per curiam)*), and the parties agree that, to this extent at least, our perception of Florida law was correct. The State argues, nonetheless, that, in this case, the State Supreme Court did support the death verdict adequately by performing harmless-error analysis. It relies on the excerpt from the state court's opinion quoted above, and particularly on the second through fourth sentences, as "declar[ing] a belief that" the trial judge's weighing of the coldness factor "was harmless beyond a reasonable doubt" in that it "did not contribute to the [sentence] obtained." *Chapman* v. *California*, 386 U. S. 18, 24 (1967). This, however, is far from apparent. Not only does the State Supreme Court's opinion fail so much as to mention

"harmless error," see *Yates* v. *Evatt*, 500 U. S. 391, 406 (1991), but the quoted sentences numbered one and five expressly refer to the quite different enquiry whether Sochor's sentence was proportional.

The State tries to counter this deficiency by arguing that the four cases cited following the fourth sentence of the quoted passage were harmless-error cases, citation to which was a shorthand signal that the court had reviewed this record for harmless error as well. But the citations come up short. Only one of the four cases contains language giving an explicit indication that the State Supreme Court had performed harmless-error analysis. See *Holton* v. *State*, 573 So. 2d 284, 293 (1990) ("We find the error was harmless beyond a reasonable doubt"). The other three simply do not, and the result is ambiguity.

Although we do not mean here to require a particular formulaic indication by state courts before their review for harmless federal error will pass federal scrutiny, a plain statement that the judgment survives on such an enquiry is clearly preferable to allusions by citation. In any event, when the citations stop as far short of clarity as these do, they cannot even arguably substitute for explicit language signifying that the State Supreme Court reviewed for harmless error.

IV

In sum, Eighth Amendment error occurred when the trial judge weighed the coldness factor. Since the Supreme Court of Florida did not explain or even "declare a belief that" this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained," *Chapman*, *supra*, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case. It follows that Sochor's sentence cannot stand on the existing record of appellate review. We vacate the judgment of the

Supreme Court of Florida and remand the case for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion but write separately to set forth my understanding that the Court does not hold that an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error. In *Chapman* v. *California*, 386 U. S. 18 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see *ante*, at 540, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was "harmless" cannot substitute for a principled explanation of how the court reached that conclusion. In *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), for example, we did not hesitate to remand a case for "a detailed explanation based on the record" when the lower court failed to undertake an explicit analysis supporting its "cryptic," one-sentence conclusion of harmless error. *Id.*, at 753. I agree with the Court that the Florida Supreme Court's discussion of the proportionality of petitioner's sentence is not an acceptable substitute for harmless error analysis, see *ante*, at 539–540, and I do not understand the Court to say that the mere addition of the words "harmless error" would have sufficed to satisfy the dictates of *Clemons*.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join in all that the Court has to say in rejecting Sochor's claim that the application of Florida's "heinousness" factor in

this case violated his constitutional rights. I also agree with the majority that Eighth Amendment error occurred when the trial judge weighed the invalid "coldness" factor in imposing Sochor's death sentence. Accordingly, I join Parts I, II, III–A, and III–B–1 of the Court's opinion. I dissent from Parts III–B–2 and IV of the opinion, however, for I believe that the Supreme Court of Florida cured this sentencing error by finding it harmless. I would thus affirm the judgment below and uphold the sentence.

When a reviewing court invalidates one or more of the aggravating factors upon which the sentencer relied in imposing a death sentence, the court may uphold the sentence by reweighing the remaining evidence or by conducting harmless-error analysis. *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). As the majority observes, the Supreme Court of Florida does not in practice independently reweigh aggravating and mitigating evidence, and it did not do so in this case. *Ante*, at 539–540. In order to sustain Sochor's sentence, the court thus had to find any error harmless. In other words, it had to find beyond a reasonable doubt that the trial judge would still have imposed the death sentence if he had not considered the "coldness" factor when performing the weighing function required by Florida law. *Clemons* v. *Mississippi*, *supra*, at 753; *Chapman* v. *California*, 386 U. S. 18, 24 (1967). It seems clear to me that the court reached this conclusion, and that the conclusion is certainly justified by the facts of this case.

After finding that the trial judge erred in relying on the "coldness" factor in determining Sochor's sentence, the Supreme Court of Florida stated:

> "The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking

> one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. *Robinson v. State*, 574 So. 2d 108 (Fla. 1991); *Holton v. State*, 573 So. 2d 284 (Fla. 1990); *James v. State*, 453 So. 2d 786 (Fla.), *cert. denied*, 469 U. S. 1098 . . . (1984); *Francois v. State*, 407 So. 2d 885 (Fla. 1981), *cert. denied*, 458 U. S. 1122 . . . (1982)." 580 So. 2d 595, 604 (1991).

The Court now holds that this passage fails to indicate that the error in this case was viewed as harmless. It is true that the passage does not mention the words "harmless error." But we have never held that a court must necessarily recite those words in determining whether an error had an effect on a certain result. In deciding whether the Supreme Court of Florida conducted adequate harmless-error analysis in this case, our focus should not be solely on the particular words and phrases it used to convey its thoughts. Whatever words it used, if they show that it concluded beyond a reasonable doubt that elimination of the "coldness" aggravating factor would have made no difference to Sochor's sentence, then it conducted adequate harmless-error analysis. See *Parker* v. *Dugger*, 498 U. S. 308, 319 (1991).

I am convinced by the passage quoted above that the Supreme Court of Florida believed, beyond a reasonable doubt, that the elimination of the "coldness" factor would have made no difference at all in this case. A review of the aggravating and mitigating evidence presented in this case demonstrates why. In making his sentencing determination, the trial judge found four aggravating circumstances, including the "coldness" aggravator. He found absolutely *no* mitigating evidence. After weighing the four aggravating circumstances against zero mitigating circumstances, the trial judge imposed the death penalty. The Supreme Court of Florida later found the "coldness" aggravating circumstance invalid. It observed, however, that three valid aggravators were left to be balanced against the complete lack of mitigating evidence. On that basis, the court concluded

that resentencing was unnecessary. After reaching that conclusion, the court cited four cases in which it had invalidated aggravating factors but had upheld the death sentences, having found that the inclusion of those aggravators made no difference to the weighing process. One of the cases cited in fact made explicit mention of harmless-error analysis. *Holton* v. *State*, 573 So. 2d 284, 293 (1990) ("Under the circumstances of this case, we cannot say there is any reasonable likelihood the trial court would have concluded that the three valid aggravating circumstances were outweighed by the mitigating factors. We find the error was harmless beyond a reasonable doubt") (citation omitted). See *supra*, at 542–543.

In my mind, it is no stretch to conclude that the court saw this case for what it is—a paradigmatic example of the situation where the invalidation of an aggravator makes absolutely no difference in the sentencing calculus. We have previously observed that the invalidation of an aggravating circumstance results in the removal of a "thumb . . . from death's side of the scale." *Stringer* v. *Black*, 503 U. S. 222, 232 (1992). Precisely for this reason, we require appellate courts to either reweigh the evidence or perform harmless-error analysis if they seek to affirm a death sentence after invalidating an aggravator. In a case such as this, however, where there is not so much as a thumbnail on the scale in favor of mitigation, I would not require appellate courts to adhere to any particular form of words to demonstrate that which is evident. If the trial judge in this case had eliminated the "coldness" aggravator from the weighing process, and had balanced the three valid aggravators against the complete absence of mitigating evidence, the absent mitigating evidence would still have failed to outweigh the aggravating evidence, and the sentence would still have been death. Although it did so cursorily, I am convinced that the Supreme Court of Florida found the inclusion of the invalid "coldness" factor harmless beyond a reasonable doubt.

It seems that the omission of the words "harmless error" from the opinion below is the root of this Court's dissatisfaction with it. In all likelihood, the Supreme Court of Florida will reimpose Sochor's death sentence on remand, perhaps by appending a sentence using the talismanic phrase "harmless error." Form will then correspond to substance, but this marginal benefit does not justify our effort to supervise the opinion writing of state courts. I would therefore affirm the judgment below.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in part and dissenting in part.

We granted certiorari to consider two questions.[1] The Court answers the first question in Parts III–B and IV of its opinion, see *ante*, at 538–540, which I join. I do not, however, agree with the Court's treatment of the plain error that occurred when the trial judge instructed the jury at the penalty phase of the trial. See *ante*, at 532–534. Florida argues that this error was harmless because the death sentence was imposed by the judge rather than the jury. The Court today does not address this argument because it concludes that petitioner waived the error by failing to object to the instruction. I disagree with this Court in its effort

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[1] Petitioner included four questions in his petition for writ of certiorari; however, the Court limited its grant to a consideration of questions two and four, which petitioner framed as follows:

"2. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?"

"4. Did the application of Florida's 'especially heinous, atrocious, or cruel' aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?" Pet. for Cert. ii.

to avoid the issue and with the Florida Supreme Court in its appraisal of the error.

I

There is no dispute that the instruction prescribing the so-called heinous, atrocious, or cruel aggravating circumstance (or heinousness factor, according to the Court's nomenclature)[2] was unconstitutionally vague under our decision in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988).[3] In *Cartwright*, the Court explained that "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" *Id.*, at 364 (citation omitted). Although a state court may adopt a limiting construction of a vague capital sentencing aggravating circumstance to give meaningful guidance to the sentencer, see *id.*, at 360, 365; *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990); *Lewis* v. *Jeffers*, 497 U. S. 764, 778–779 (1990); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion), or a state appellate court might apply a limiting definition of the aggravating circumstance to the facts presented, see *Cartwright*, 486 U. S., at 364; *Walton*, 497 U. S., at 653; *Jeffers*, 497 U. S., at 778–779; *Godfrey*, 446 U. S., at 429, the Florida Supreme

[2] The trial judge gave the following instruction with respect to the heinous, atrocious, or cruel aggravating circumstance: "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. . . . [N]umber three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." App. 326–327.

[3] See *Walton* v. *Arizona*, 497 U. S. 639, 653 (1990) ("It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face"); *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) ("There is nothing in these few words, ['outrageously or wantonly vile, horrible and inhuman,'] standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence").

Court has failed to do so here. In *Proffitt* v. *Florida*, 428 U. S. 242, 255–256 (1976), this Court approved the limiting construction adopted by the Florida Supreme Court for the heinousness factor;[4] however, the guidance given in *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973), was certainly not provided in the bare bones of the instruction given by the trial court in this case. See n. 2, *supra*.

II

Petitioner's failure to object to the instruction at trial did not deprive the Florida Supreme Court or this Court of the power to correct the obvious constitutional error. First, petitioner did object to the vagueness of this aggravating circumstance in a Motion To Declare Section 921.141, Florida Statutes Unconstitutional Re: Aggravating and Mitigating Circumstances at the start of trial, see App. 8, 10;[5] however, that motion was denied. See 1 Tr. 9. Second, the Florida Supreme Court, though noting that petitioner had failed to make a contemporaneous objection to the instruction at the time of trial, nevertheless went on to reach the merits of petitioner's claim. See 580 So. 2d 595, 603 (1991). Thus, the Florida Supreme Court, far from providing us with a plain statement that petitioner's claim was procedurally barred, see *Michigan* v. *Long*, 463 U. S. 1032, 1042 (1983), has merely said that the claim was "not preserved for appeal," 580 So. 2d, at 602, and has given even further indica-

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[4] In *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U. S. 943 (1974), the Florida courts had construed the heinousness factor to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 283 So. 2d, at 9.

[5] In particular, petitioner alleged:

"Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance indicates that reasonable and consistent application is impossible. This standard is vague and overbroad and provides no basis for distinguishing one factual situation from another. *Godfrey* v. *Georgia*, 446 U. S. 420 (1980)." App. 10.

tion that petitioner's claim was not procedurally barred by proceeding to the merits, albeit in the alternative. Third, and most important, the state court may review a fundamental error despite a party's failure to make a contemporaneous objection in the trial court,[6] and it unquestionably has the power to review this error even though the error may not have been properly preserved for appeal.[7] As the Florida Supreme Court explained, "[f]undamental error has been defined as 'error which goes to the foundation of the case or goes to the merits of the cause of action,'" and although it is to be applied "'very guardedly,'" it nevertheless is to be applied in those "rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ray* v. *State*, 403 So. 2d 956, 960 (1981) (citations omitted).[8] Presumably because the

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[6] See, *e. g.*, *Ray* v. *State*, 403 So. 2d 956, 960 (Fla. 1981) ("This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process"); *Castor* v. *State*, 365 So. 2d 701, 704, n. 7 (Fla. 1978) (same); *State* v. *Smith*, 240 So. 2d 807, 810 (Fla. 1970) (same).

[7] The Florida Supreme Court's statement that none of the alleged errors in the jury instructions had been "preserved for appeal," 580 So. 2d 595, 602 (1991), merely raised the question whether they should nevertheless be reviewed under the "fundamental error" exception. That question was answered by the court's statement that petitioner's claims "have no merit." *Id.*, at 603.

[8] The Court clearly misconstrues my point about fundamental error if it understands me to be saying that all errors concerning an improper instruction on the heinous, atrocious, or cruel aggravating circumstance "would automatically be 'fundamental.'" *Ante*, at 535, n. Quite simply, my point is *not* that such error necessarily constitutes fundamental error, but rather, that such error can be the subject of fundamental error review. In other words, the Florida Supreme Court is not without power, even when the defendant has failed to raise an objection at trial, to consider whether such error constitutes fundamental error. Although the Florida Supreme Court may not necessarily find fundamental error in the particular instance, it is, nevertheless, willing and able to consider whether fundamental error has occurred. See, *e. g.*, *Walton* v. *State*, 547 So. 2d 622, 625–626 (Fla. 1989) ("Absent fundamental error, failure to object to the

state court reviews for fundamental error, but did not find such error here, the State did not oppose the petition for certiorari by arguing procedural default. See Brief in Opposition 11 (State argued heinousness factor was not unconstitutionally vague). Under these circumstances, the State has waived any possible procedural objection to our consideration of the erroneous jury instruction,[9] and this Court, contrary to its protestation, is not "without authority" to address petitioner's claim. *Ante*, at 534.

III

We should reject unequivocally Florida's submission that erroneous jury instructions at the penalty phase of a capital case are harmless because the trial judge is the actual sentencer and the jury's role is purely advisory. That submission is unsound as a matter of law, see, *e. g.*, *Riley* v. *Wainwright*, 517 So. 2d 656, 659 (Fla. 1987); *Hall* v. *State*, 541 So. 2d 1125, 1129 (Fla. 1989), and as a matter of fact.

As a matter of law, the jury plays an essential role in the Florida sentencing scheme. Under *Tedder* v. *State*, 322

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jury instructions at trial precludes appellate review. . . . We find no fundamental error in the instructions"), cert. denied, 493 U. S. 1036 (1990); *Smalley* v. *State*, 546 So. 2d 720, 722 (Fla. 1989).

[9] See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985) ("Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived").

Contrary to the Court's suggestion that I have forgotten that the "defense" is jurisdictional, see *ante*, at 535, n., I believe the Court has forgotten that we have ample power to review a state court's disposition of a federal question on its merits. If the Florida Supreme Court has jurisdiction to consider petitioner's claim, as I believe it does when it engages in fundamental error review and reaches the merits of the claim, then this Court also has jurisdiction to reach the merits.

So. 2d 908 (Fla. 1975), and its progeny,[10] a jury's recommendation must be given "great weight." *Id.*, at 910. The Florida Supreme Court explained that a jury recommendation of a life sentence can be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Ibid.*[11]

Similarly, a jury's recommendation of a death sentence must also be given great weight.[12] For example, in *Stone* v. *State*, 378 So. 2d 765, cert. denied, 449 U. S. 986 (1980), the Florida Supreme Court discussed a challenge to a death sentence imposed after a jury had recommended a sentence

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[10] See, *e. g.*, *Thompson* v. *State*, 328 So. 2d 1 (Fla. 1976).

[11] As the Eleventh Circuit observed about the Florida Supreme Court: "That the court meant what it said in *Tedder* is amply demonstrated by the dozens of cases in which it has applied the *Tedder* standard to reverse a trial judge's attempt to override a jury recommendation of life. *See, e. g.*, *Wasko v. State*, 505 So. 2d 1314, 1318 (Fla. 1987); *Brookings v. State*, 495 So. 2d 135, 142–43 (Fla. 1986); *McCampbell v. State*, 421 So. 2d 1072, 1075–76 (Fla. 1982); *Goodwin v. State*, 405 So. 2d 170, 172 (Fla. 1981); *Odom v. State*, 403 So. 2d 936, 942–43 (Fla. 1981), *cert. denied*, 456 U. S. 925 . . . (1982); *Neary v. State*, 384 So. 2d 881, 885–88 (Fla. 1980); *Malloy v. State*, 382 So. 2d 1190, 1193 (Fla. 1979); *Shue* v. *State*, 366 So. 2d 387, 390–91 (Fla. 1978); *McCaskill v. State*, 344 So. 2d 1276, 1280 (Fla. 1977); *Thompson v. State*, 328 So. 2d 1, 5 (Fla. 1976)." *Mann* v. *Dugger*, 844 F. 2d 1446, 1451 (1988) (en banc), cert. denied, 489 U. S. 1071 (1989).

[12] *Smith* v. *State*, 515 So. 2d 182, 185 (Fla. 1987) ("[W]e approve the death sentence on the basis that a jury recommendation of death is entitled to great weight"), cert. denied, 485 U. S. 971 (1988); see also *LeDuc* v. *State*, 365 So. 2d 149, 151 (Fla. 1978) ("The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data w[ere] considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation"), cert. denied, 444 U. S. 885 (1979); *Ross* v. *State*, 386 So. 2d 1191, 1197 (Fla. 1980) (same); *Middleton* v. *State*, 426 So. 2d 548, 552–553 (Fla. 1982) (approving trial court's imposition of death sentence and reiterating that jury had recommended death), cert. denied, 463 U. S. 1230 (1983); *Francois* v. *State*, 407 So. 2d 885, 891 (Fla. 1981) (same), cert. denied, 458 U. S. 1122 (1982); cf. *Grossman* v. *State*, 525 So. 2d, at 839, n. 1 ("We have . . . held that a jury recommendation of death should be given great weight").

of death. The petitioner had based his challenge on a similar case, *Swan* v. *State*, 322 So. 2d 485 (Fla. 1975), in which the court had reversed the death sentence. In affirming Stone's sentence, however, the court pointed out that the critical difference between Stone's case and Swan's case was that "Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975)." 378 So. 2d, at 772.[13]

As a matter of fact, the jury sentence is the sentence that is usually imposed by the Florida Supreme Court. The State has attached an appendix to its brief, see App. to Brief for Respondent A1–A70, setting forth data concerning 469 capital cases that were reviewed by the Florida Supreme Court between 1980 and 1991. In 341 of those cases (73%), the jury recommended the death penalty; in none of those cases did the trial judge impose a lesser sentence. In 91 cases (19%), the jury recommended a life sentence; in all but one of those cases, the trial judge overrode the jury's recommended life sentence and imposed a death sentence. In 69 of those overrides (77%), however, the Florida Supreme Court vacated the trial judge's sentence and either imposed a life sentence itself or remanded for a new sentencing hearing.[14]

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[13] The Florida courts have long recognized the integral role that the jury plays in their capital sentencing scheme. See, *e. g.*, *Messer* v. *State*, 330 So. 2d 137, 142 (Fla. 1976) ("[T]he legislative intent that can be gleaned from Section 921.141 . . . [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part"); see also *Riley* v. *Wainwright*, 517 So. 2d 656, 657 (Fla. 1988) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process"); *Lamadline* v. *State*, 303 So. 2d 17, 20 (Fla. 1974) (right to sentencing jury is "an essential right of the defendant under our death penalty legislation").

[14] In 37 out of the 469 cases, there was no jury recommendation either because the defendant had waived the right to a jury trial or had offered a plea, or because the jury selection or trial had to be redone.

Two conclusions are evident. First, when the jury recommends a death sentence, the trial judge will almost certainly impose that sentence. Second, when the jury recommends a life sentence, although overrides have been sustained occasionally, the Florida Supreme Court will normally uphold the jury rather than the judge. It is therefore clear that in practice, erroneous instructions to the jury at the sentencing phase of the trial may make the difference between life or death.

When a jury has been mistakenly instructed on the heinous, atrocious, or cruel aggravating circumstance, the Florida Supreme Court, acknowledging the important role that the jury plays in the sentencing scheme, has held that the error was reversible. For example, in *Jones* v. *State*, 569 So. 2d 1234 (1990), in which the jury was instructed on the heinousness factor, but the body had been sexually abused *after* death, and the death had occurred quickly as the result of a gunshot wound, the Florida Supreme Court concluded that the heinousness factor was inapplicable and that its inclusion in the instructions constituted reversible error. Similarly, in *Omelus* v. *State*, 584 So. 2d 563 (1991), when the trial court had instructed the jury on the heinousness factor even though the defendant had contracted with a third party to perform the killing, and had no knowledge of how the murder was accomplished, the Florida Supreme Court remanded the case for resentencing. Thus, the Florida Supreme Court recognized that when the jury's deliberative process is infected by consideration of an inapplicable aggravating factor, the sentence must be vacated unless the error is harmless beyond a reasonable doubt.[15] Similarly, the court has recog-

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[15] As the Eleventh Circuit observed:

"[T]he Florida Supreme Court will vacate the [death] sentence and order resentencing before a new jury if it concludes that the proceedings before the original jury were tainted by error. . . . In those cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation. . . . Such a focus would be illogical unless the supreme

nized that when the jury is given an instruction that is unconstitutionally vague, the jury's deliberative process is also tainted,[16] and a remand is appropriate so that the jury can reach a sentence that is not influenced by the unconstitutional factor unless the error is harmless beyond a reasonable doubt.

The harmless-error inquiry to be conducted by the Florida Supreme Court on remand should, therefore, encompass the erroneous jury instruction on the heinousness factor and the error in submitting an instruction on the cold, calculated, and premeditated aggravating circumstance to the jury when the evidence did not support such an instruction, as well as the error committed by the trial judge in relying on that factor.

For the reasons given above, I concur in Parts I, III–B, and IV, and respectfully disagree with Parts II–A, II–B, and III–A.

JUSTICE SCALIA, concurring in part and dissenting in part.

I join the Court's opinion insofar as it rejects petitioner's challenge to the heinous, atrocious, and cruel aggravating factor. I dissent, however, from its holding that the death sentence in this case is unconstitutional because the Florida Supreme Court failed to find "harmless error" after having invalidated the trial judge's "coldness" finding.

Even without that finding, three unquestionably valid aggravating factors remained, so that the death sentence com-

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court began with the premise that the jury's recommendation must be given significant weight by the trial judge. Once that premise is established, a focus on how the error may have affected the jury's recommendation makes sense: if the jury's recommendation is tainted, then the trial court's sentencing decision, which took into account that recommendation, is also tainted." *Mann* v. *Dugger*, 844 F. 2d, at 1452–1453 (footnote omitted).

[16] As the court explained in *Riley* v. *Wainwright*, 517 So. 2d, at 659: "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."

plied with the so-called "narrowing" requirement imposed by the line of cases commencing with *Furman* v. *Georgia*, 408 U. S. 238 (1972). The constitutional "error" whose harmlessness is at issue, then, concerns only the inclusion of the "coldness" factor in the weighing of the aggravating factors against the mitigating evidence petitioner offered. It has been my view that the Eighth Amendment does not require any consideration of mitigating evidence, see *Walton* v. *Arizona*, 497 U. S. 639, 656 (1990) (opinion concurring in part and concurring in judgment)—a view I am increasingly confirmed in, as the byzantine complexity of the death penalty jurisprudence we are annually accreting becomes more and more apparent. Since the weighing here was in my view not constitutionally required, any error in the doing of it raised no federal question. For that reason, I would affirm the death sentence.

Syllabus

LUJAN, SECRETARY OF THE INTERIOR *v.* DEFENDERS OF WILDLIFE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90–1424. Argued December 3, 1991—Decided June 12, 1992

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)'s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section's geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)'s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court's dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary's motion, which renewed his objection to standing, and granted respondents' motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded.

911 F. 2d 117, reversed and remanded.

JUSTICE SCALIA delivered the opinion of the Court, except as to Part III–B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 559–567, 571–578.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia*, that they have suffered an injury in fact, *i. e.*, a concrete and particularized, actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 559–562.

Syllabus

(b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed to show that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See *Sierra Club* v. *Morton*, 405 U. S. 727, 735, 739. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in *Lujan* v. *National Wildlife Federation*, 497 U. S. 871. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 562–567.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. See, *e. g.*, *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, §3. Pp. 571–578.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C. J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 579. STEVENS, J., filed an opinion concurring in the judgment, *post*,

p. 581. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 589.

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Starr, Acting Assistant Attorney General Hartman, Deputy Solicitor General Wallace, Robert L. Klarquist, David C. Shilton, Thomas L. Sansonetti*, and *Michael Young.*

Brian B. O'Neill argued the cause for respondents. With him on the brief were *Steven C. Schroer* and *Richard A. Duncan.**

JUSTICE SCALIA delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered

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**Terence P. Ross, Daniel J. Popeo*, and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of Austin et al. by *William A. Butler, Angus E. Crane, Michael J. Bean, Kenneth Oden, James M. McCormack*, and *Wm. Robert Irvin;* for the American Association of Zoological Parks & Aquariums et al. by *Ronald J. Greene* and *W. Hardy Callcott;* for the American Institute of Biological Sciences by *Richard J. Wertheimer* and *Charles M. Chambers;* and for the Ecotropica Foundation of Brazil et al. by *Durwood J. Zaelke.*

A brief of *amici curiae* was filed for the State of Texas et al. by *Patrick J. Mahoney, Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Nancy N. Lynch, Mary Ruth Holder*, and *Shannon J. Kilgore*, Assistant Attorneys General, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Robert A. Butterworth*, Attorney General of Florida, *Michael E. Carpenter*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert J. Del Tufo*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *Lee Fisher*, Attorney General of Ohio, and *Jeffrey L. Amestoy*, Attorney General of Vermont, *Victor A. Kovner, Leonard J. Koerner, Neal M. Janey*, and *Louise H. Renne.*

Species Act of 1973 (ESA), 87 Stat. 892, as amended, 16 U. S. C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U. S. C. § 1531 *et seq.*, seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA* v. *Hill*, 437 U. S. 153 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U. S. C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U. S. C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed. Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpret-

ing § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed. Reg. 29990, and promulgated in 1986, 51 Fed. Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary's motion to dismiss for lack of standing. *Defenders of Wildlife* v. *Hodel*, 658 F. Supp. 43, 47–48 (Minn. 1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife* v. *Hodel*, 851 F. 2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation. *Defenders of Wildlife* v. *Hodel*, 707 F. Supp. 1082 (Minn. 1989). The Eighth Circuit affirmed. 911 F. 2d 117 (1990). We granted certiorari, 500 U. S. 915 (1991).

II

While the Constitution of the United States divides all power conferred upon the Federal Government into "legislative Powers," Art. I, § 1, "[t]he executive Power," Art. II, § 1, and "[t]he judicial Power," Art. III, § 1, it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers de-

pends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In The Federalist No. 48, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and . . . more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." The Federalist No. 48, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in Article III—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. See, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see *id.*, at 756; *Warth* v. *Seldin*, 422 U. S. 490, 508 (1975); *Sierra Club* v. *Morton*, 405 U. S. 727, 740–741, n. 16 (1972);[1] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" *Whitmore*, *supra*, at 155 (quoting *Los Angeles* v. *Lyons*, 461 U. S. 95, 102 (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Simon* v. *Eastern Ky. Welfare*

[1] By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

Rights Organization, 426 U. S. 26, 41–42 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 38, 43.

The party invoking federal jurisdiction bears the burden of establishing these elements. See *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 231 (1990); *Warth*, *supra*, at 508. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i. e.*, with the manner and degree of evidence required at the successive stages of the litigation. See *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 883–889 (1990); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 114–115, and n. 31 (1979); *Simon*, *supra*, at 45, n. 25; *Warth*, *supra*, at 527, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, *supra*, at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, *supra*, at 115, n. 31.

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has

caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 615 (1989) (opinion of KENNEDY, J.); see also *Simon*, *supra*, at 41–42; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E. g.*, *Warth*, *supra*, at 505. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen*, *supra*, at 758; *Simon*, *supra*, at 44–45; *Warth*, *supra*, at 505.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of

standing. See, *e. g., Sierra Club* v. *Morton*, 405 U. S., at 734. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.*, at 734–735. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.*, at 735, 739. See generally *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977).

With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and "observed the traditional habitat of the endangered nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly," and that she "will suffer harm in fact as the result of [the] American . . . role . . . in overseeing the rehabilitation of the Aswan High Dam on the Nile . . . and [in] develop[ing] . . . Egypt's . . . Master Water Plan." App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and "observed th[e] habitat" of "endangered species such as the Asian elephant and the leopard" at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she "was unable to see any of the endangered species"; "this development project," she continued, "will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited . . . [, which] may severely shorten the future of these species"; that threat, she concluded, harmed her because she "intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard." *Id.*, at 145–146. When Ms. Skilbred was asked

at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that "I intend to go back to Sri Lanka," but confessed that she had no current plans: "I don't know [when]. There is a civil war going on right now. I don't know. Not next year, I will say. In the future." *Id.*, at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to Mses. Kelly and Skilbred. That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.'" *Lyons*, 461 U. S., at 102 (quoting *O'Shea* v. *Littleton*, 414 U. S. 488, 495–496 (1974)). And the affiants' profession of an "inten[t]" to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require. See *supra*, at 560.[2]

[2] The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because "a reasonable finder of fact could conclude . . . that . . . Kelly or Skilbred will soon return to the project sites." *Post*, at 591. This analysis suffers either from a factual or from a legal defect, depending on what the "soon" is supposed to mean. If "soon" refers to the standard mandated by our precedents—that the injury be "imminent," *Whitmore* v. *Arkansas*, 495 U. S. 149, 155 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents' mere profession of an intent, some day, to

Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled "ecosystem nexus," proposes that any person who uses *any part* of a "contiguous ecosystem" adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental dam-

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return. But if, as we suspect, "soon" means nothing more than "in this lifetime," then the dissent has undertaken quite a departure from our precedents. Although "imminence" is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is "'"*certainly* impending,"'" *id.*, at 158 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, *e. g.*, *id.*, at 156–160; *Los Angeles* v. *Lyons*, 461 U. S. 95, 102–106 (1983).

There is no substance to the dissent's suggestion that imminence is demanded only when the alleged harm depends upon "the affirmative actions of third parties beyond a plaintiff's control," *post*, at 592. Our cases *mention* third-party-caused contingency, naturally enough; but they also mention the plaintiff's failure to show that he will soon expose *himself* to the injury, see, *e. g.*, *Lyons*, *supra*, at 105–106; *O'Shea* v. *Littleton*, 414 U. S. 488, 497 (1974); *Ashcroft* v. *Mattis*, 431 U. S. 171, 172–173, n. 2 (1977) *(per curiam)*. And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand . . . detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. *Post*, at 593. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

age must use the area affected by the challenged activity and not an area roughly "in the vicinity" of it. 497 U. S., at 887–889; see also *Sierra Club*, 405 U. S., at 735. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U. S. C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

Respondents' other theories are called, alas, the "animal nexus" approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the "vocational nexus" approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not "an ingenious academic exercise in the conceivable," *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669, 688 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that

might have been the subject of his interest will no longer exist, see *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 231, n. 4 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.[3]

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[3] The dissent embraces each of respondents' "nexus" theories, rejecting this portion of our analysis because it is "unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm" to the plaintiff. *Post*, at 594–595. But summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, "certainly impending." The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not "*necessarily*" prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent's position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in *Sierra Club*, for example, could have avoided the necessity of establishing anyone's use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. JUSTICE BLACKMUN's accusation that a special rule is being crafted for "environmental claims," *post*, at 595, is correct, but *he* is the craftsman.

JUSTICE STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post*, at 583–584, and n. 2. We decline to join JUSTICE STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from

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Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, "suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal-court adjudication." *Allen*, 468 U. S., at 759–760.

The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary's controlling authority, see, *e. g.*, 16 U. S. C. § 1533(a)(1) ("The Secretary shall" promulgate regulations determining endangered species); § 1535(d)(1) ("The Secretary is authorized to provide financial assistance to any State"), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with

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a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

the agencies, see § 1536(a)(2) ("*Each Federal agency shall*, in consultation with and with the assistance of the Secretary, insure that any" funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see 51 Fed. Reg. 19928 (1986). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary's authority. (During the period when the Secretary took the view that § 7(a)(2) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)

Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary's authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents' alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.[4] The

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[4] We need not linger over the dissent's facially impracticable suggestion, *post*, at 595–596, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post*, at 596–597: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 830 (1989) (empha-

Court of Appeals tried to finesse this problem by simply proclaiming that "[w]e are satisfied that an injunction requiring the Secretary to publish [respondents' desired] regulatio[n] . . . would result in consultation." *Defenders of Wildlife*, 851 F. 2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the position that the regulation is not binding.[5] The

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sis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post*, at 598–599, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.*, that Rule 19 of the Federal Rules of Civil Procedure, governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the Article III standing requirement and the "*complete* relief" referred to by Rule 19 are not identical. Finally, we reach the dissent's contention, *post*, at 599, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction . . . a one-way street running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a preexisting standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

[5] Seizing on the fortuity that the case has made its way to *this* Court, JUSTICE STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post*, at 585. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing

short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.

A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in *Simon*, 426 U. S., at 43–44, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.[6] There is no standing.

IV

The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a "procedural injury." The so-called "citizen-suit" provision of the ESA provides, in pertinent part, that "any person may com-

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is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.

[6] The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post*, at 600–601. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the "'negative impacts to the wildlife,'" *post*, at 600, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.

mence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U. S. C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a "procedural righ[t]" to consultation in all "persons"—so that *anyone* can file suit in federal court to challenge the Secretary's (or presumably any other official's) failure to follow the assertedly correct consultative procedure, notwithstanding his or her inability to allege any discrete injury flowing from that failure. 911 F. 2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e. g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).[7] Nor is it simply a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the

[7] There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental "right" to have the Executive observe the procedures required by law. We reject this view.[8]

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that

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[8] The dissent's discussion of this aspect of the case, *post*, at 601–606, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties . . . so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post*, at 605. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221 (1986), and *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332 (1989), *post*, at 602–603, 605, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting," see 478 U. S., at 230–231, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see *Methow Valley Citizens Council* v. *Regional Forester*, 833 F. 2d 810, 812–813 (CA9 1987).

no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy. For example, in *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

> "[This is] not a case within the meaning of . . . Article III . . . . Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit . . . ." *Ibid.*

In *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), we dismissed for lack of Article III standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

> "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . . Here the parties plaintiff have no such case. . . . [T]heir complaint . . . is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." *Id.*, at 488–489.

In *Ex parte Lévitt*, 302 U. S. 633 (1937), we dismissed a suit contending that Justice Black's appointment to this Court violated the Ineligibility Clause, Art. I, §6, cl. 2.

"It is an established principle," we said, "that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." 302 U. S., at 634. See also *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 433–434 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States* v. *Richardson*, 418 U. S. 166 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government's failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." We held that such a suit rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because "the impact on [plaintiff] is plainly undifferentiated and 'common to all members of the public.'" *Richardson*, *supra*, at 171, 176–177. And in *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance . . . . We reaffirm *Lévitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind . . . ." *Schlesinger*, *supra*, at 217, 220. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because

"'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.'" *Allen*, 468 U. S., at 754; *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 483 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal's execution on the basis of "'the public interest protections of the Eighth Amendment'"; once again, "[t]his allegation raise[d] only the 'generalized interest of all citizens in constitutional governance' . . . and [was] an inadequate basis on which to grant . . . standing." *Whitmore*, 495 U. S., at 160.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches. "The province of the court," as Chief Justice Marshall said in *Marbury* v. *Madison*, 1 Cranch 137, 170 (1803), "is, solely, to decide on the rights of individuals." Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and

that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, §3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," *Massachusetts* v. *Mellon*, 262 U. S., at 489, and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Allen*, *supra*, at 760 (quoting *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972)). We have always rejected that vision of our role:

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. . . . This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. . . . But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark* v. *Wickard*, 321 U. S. 288, 309–310 (1944) (footnote omitted).

"Individual rights," within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also *Sierra Club*, 405 U. S., at 740–741, n. 16.

Nothing in this contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth*, 422 U. S., at 500 (quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617, n. 3 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 208–212 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 6 (1968)). As we said in *Sierra Club*, "[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U. S., at 738. Whether or not the principle set forth in *Warth* can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are "among the injured." *Sierra Club* v. *Morton*, 405 U. S. 727, 735 (1972). This component of the standing inquiry is not satisfied unless

> "[p]laintiffs . . . demonstrate a 'personal stake in the outcome.' . . . Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Los Angeles* v. *Lyons*, 461 U. S. 95, 101–102 (1983) (citations omitted).

While it may seem trivial to require that Mses. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante*, at 564, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see *Sierra Club* v. *Morton*, *supra*, at 735, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' "ecosystem nexus," "animal nexus," and "vocational nexus" theories, *ante*, at 565–567, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 231, n. 4 (1986) ("[R]espondents . . . undoubtedly have alleged a sufficient 'injury in fact' in that

the whale watching and studying of their members will be adversely affected by continued whale harvesting").

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury* v. *Madison*, 1 Cranch 137 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and I do not read the Court's opinion to suggest a contrary view. See *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975); *ante*, at 578. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on "any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter," it does not of its own force establish that there is an injury in "any person" by virtue of any "violation." 16 U. S. C. § 1540(g)(1)(A).

The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III. I agree that it would exceed those limitations if, at the behest of Congress and in the ab-

sence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.

With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

JUSTICE STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U. S. C. § 1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclu-

sion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U. S. C. § 1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing,[1] and the Court reiterates that holding today. See *ante*, at 562–563.

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante*, at 564. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment,

[1] See, *e. g.*, *Sierra Club* v. *Morton*, 405 U. S. 727, 734 (1972); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669, 686–687 (1973); *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 230–231, n. 4 (1986).

therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante*, at 564, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural,' or 'hypothetical.'" *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974) (quoting *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e. g.*, *Whitmore* v. *Arkansas*, 495 U. S. 149, 158–159 (1990); *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983); *O'Shea*, 414 U. S., at 497. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only poten-

tial source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skilbred have introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As JUSTICE BLACKMUN explains, *post*, at 591–592, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is

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[2] As we recognized in *Sierra Club* v. *Morton*, 405 U. S., at 735, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened . . . ." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents, cf. *ante*, at 579 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante*, at 568–571. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante*, at 571. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As JUSTICE BLACKMUN explains, *post*, at 599–601, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 284–285 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.*, at 285, and therefore presume that "'legislation of Congress, unless a

contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,'" *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (quoting *Foley Bros.*, 336 U. S., at 285).

Section 7(a)(2) provides, in relevant part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[3]], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. . . ." 16 U. S. C. § 1536(a)(2).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic reference in

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[3] The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U. S. C. § 1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed. Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

[4] Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U. S. C. § 1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the

the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed. Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of

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extraterritorial application of statutes. 911 F. 2d 117, 122 (CA8 1990); see also *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 282, 287–288 (1949) (statute requiring an 8-hour day provision in "'[e]very contract made to which the United States . . . is a party'" is inapplicable to contracts for work performed in foreign countries).

[5] Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

[6] Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies extraterritorially even if the latter does not. 911 F. 2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

endangered species is the "destruction of natural habitat." S. Rep. No. 93–307, p. 2 (1973); see also H. Rep. No. 93–412, p. 2 (1973); *TVA* v. *Hill*, 437 U. S. 153, 179 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) . . . in the development and management of programs in that country which [are] . . . necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U. S. C. § 1537(a). It also directs the Secretary of the Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. § 1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence

of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people.*" §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.[7]

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court's breadth of language in rejecting standing for "procedural" injuries. I fear the Court seeks to impose fresh limitations on the constitutional authority of Congress to allow

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[7] Of course, Congress also found that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements]," and that "encouraging the States . . . to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments . . . ." 16 U. S. C. §§ 1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F. 2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

citizen suits in the federal courts for injuries deemed "procedural" in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual "Cases" and "Controversies." To ensure the presence of a "case" or "controversy," this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984).

A

To survive petitioner's motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a "genuine issue" of material fact as to standing. Fed. Rule Civ. Proc. 56(c). This is not a heavy burden. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 248 (1986). This Court's "function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.*, at 249.

The Court never mentions the "genuine issue" standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, "affidavits or other evidence showing, through specific facts" the existence of injury. *Ante*, at 563. The Court thereby confuses respondents' evidentiary burden (*i. e.*, affidavits asserting "specific facts") in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (*i. e.*, the existence of a "genuine issue" of "material fact") under Rule 56(c).

1

Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least "questionable" (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.[1] *Ante*, at 564. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the "actual or imminent" injury standard. The Court dismisses Kelly's and Skilbred's general state-

[1] The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in "mitigating the negative impacts to the wildlife involved." *Ibid.* In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: "The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system." *Id.*, at 215. It adds: "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife." *Id.*, at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment "showed that the [Mahaweli] project could affect several endangered species." *Id.*, at 159.

ments that they intended to revisit the project sites as "simply not enough." *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court's contention that Kelly's and Skilbred's past visits "prov[e] nothing," *ibid.*, the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. *Los Angeles* v. *Lyons*, 461 U. S. 95, 102 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury") (internal quotation marks omitted). Similarly, Kelly's and Skilbred's professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a "description of concrete plans" or "specification of *when* the some day [for a return visit] will be," *ante*, at 564, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 155–156 (1990) (harm to plaintiff death-row inmate from fellow inmate's execution depended on the court's one day reversing plaintiff's conviction or sentence and considering comparable sentences at resentencing); *Los Angeles* v. *Lyons*, 461 U. S., at 105 (harm dependent on police's arresting plaintiff again

and subjecting him to chokehold); *Rizzo* v. *Goode*, 423 U. S. 362, 372 (1976) (harm rested upon "what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures"); *O'Shea* v. *Littleton*, 414 U. S. 488, 495–498 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs' being arrested, tried, convicted, and sentenced); *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969) (harm to plaintiff dependent on a former Congressman's (then serving a 14-year term as a judge) running again for Congress). To be sure, a plaintiff's unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court's demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a "description of concrete plans" for her nightly schedule of attempted activities.

The Court also concludes that injury is lacking, because respondents' allegations of "ecosystem nexus" failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante*, at 565–566. To support that conclusion, the Court mischaracterizes our decision in *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990), as establishing a general rule that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity." *Ante*, at 565–566. In *National Wildlife Federation*, the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff's visual enjoyment of nature from mining activities. 497 U. S., at 888. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, *e. g.*, *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, *e. g.*, *Arkansas* v. *Oklahoma*, 503 U. S. 91 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant's failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents' claim of vocational or professional injury. The Court says that it is "beyond all reason" that a zoo "keeper" of Asian elephants would have standing to contest his Government's participation in the eradication of all the Asian elephants in another part of the world. *Ante*, at 566. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling

at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper's livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court's decision today should not be interpreted "to foreclose the possibility . . . that in different circumstances a nexus theory similar to those proffered here might support a claim to standing." *Ante*, at 579 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 74–75, and n. 20 (1978) (plaintiff must show "substantial likelihood" that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the "action agencies" (*e. g.*, AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly bound by being subject to petitioner Secretary's regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).[2] And he has previously

[2] This section provides in part:

"(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any

taken the same position in this very litigation, having stated in his answer to the complaint that petitioner "admits the Fish and Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act]." App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play "Three-Card Monte" with its description of agencies' authority to defeat standing against the agency given the lead in administering a statutory scheme.

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner's regulation), the plurality concludes that "there is no reason they should be obliged to honor an incidental legal determination the suit produced." *Ante*, at 569. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.[3] Under

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action may affect listed species or critical habitat. If such a determination is made, formal consultation is required . . . ."

The Secretary's intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See 51 Fed. Reg. 19928 (1986) ("Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as 'nonbinding guidelines' that would govern only the Service's role in consultation . . . . The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7").

[3] For example, petitioner's motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as "counsel" to the attorneys from the Justice Department in this action. One AID lawyer actually

principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

> "[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record." *Souffront* v. *Compagnie des Sucreries de Porto Rico*, 217 U. S. 475, 487 (1910).

This principle applies even to the Federal Government. In *Montana* v. *United States*, 440 U. S. 147 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. "Thus, although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.*, at 155. See also *United States* v. *Mendoza*, 464 U. S. 154, 164, n. 9 (1984) (Federal Government estopped where it "constituted a 'party' in all but a technical sense"). In my view, the action agencies have had sufficient "laboring oars" in this litigation since its inception to be bound from subsequent

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entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing that "'[a]n extension is necessary for the Department of Justice to consult with . . . the Department of State [on] the brief.'" See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

relitigation of the extraterritorial scope of the § 7 consultation requirement.[4] As a result, I believe respondents' injury would likely be redressed by a favorable decision.

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[4] The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court's statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: "'The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*'" *Ante*, at 569, n. 4 (quoting *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 830 (1989)). See also *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824) (Marshall, C. J.). The plurality proclaims that "[i]t cannot be" that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante*, at 570, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: "When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies." *Ante*, at 569. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; 51 Fed. Reg. 19926 (1986). As the plurality further admits, questions about compliance of other agencies with the Secretary's regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante*, at 569. Thus, it was, to borrow the plurality's own words, "assuredly not true when this suit was filed, naming the Secretary alone," *ante*, at 569, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of Rule 19 of the Federal Rules of Civil Procedure. Rule 19 provides in part for the joinder of persons if "in the person's absence complete relief cannot be accorded among those already parties." This presupposes nonredressability at the outset of the litigation. Under the plurality's rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.

Third, the rule articulated in *Newman-Green* is that the existence of federal jurisdiction "*ordinarily*" depends on the facts at the initiation of

The second redressability obstacle relied on by the plurality is that "the [action] agencies generally supply only a fraction of the funding for a foreign project." *Ante*, at 571. What this Court might "generally" take to be true does not eliminate the existence of a genuine issue of fact to withstand summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that "AID, for example, has provided less than 10% of the funding for the Mahaweli project." *Ibid.* The plurality neglects to mention that this "fraction" amounts to $170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than $6 billion in 1986 when respondents filed

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the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the §7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality's analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi–xvii (1990).

The plurality flatly states: "Respondents have produced nothing to indicate that the projects they have named will . . . do less harm to listed species, if that fraction is eliminated." *Ante*, at 571. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that "[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved." App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

> "The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project." *Id.*, at 216.

I do not share the plurality's astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality's assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was "overseeing" the rehabilitation of the Aswan project. *Id.*, at 101. See also *id.*, at 65 (Bureau of Reclamation publication stating: "In 1982, the Egyptian government . . . requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project").

I find myself unable to agree with the plurality's analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any "procedural injury" suffered by respondents is insufficient to confer standing. It rejects the view that the "injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Ante*, at 573. Whatever the Court might mean with that very broad language, it cannot be saying that "procedural injuries" *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as "procedural." Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as

"procedural" injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, "procedurally" issues a pollution permit, those affected by the permittee's pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that "procedural" injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court's standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of "agencies' observance of a particular, statutorily prescribed procedure" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, §3." *Ante*, at 576, 577. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court's anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas, however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221 (1986), the Court examined a

statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which "diminis[h] the effectiveness" of an international whaling convention. *Id.*, at 226. The Court expressly found standing to sue. *Id.*, at 230–231, n. 4. In *Robertson* v. *Methow Valley Citizens Council*, 490 U. S. 332, 348 (1989), this Court considered injury from violation of the "action-forcing" procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of §7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency "a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." 16 U. S. C. §1536(b)(3)(A). The Secretary is also obligated to suggest "reasonable and prudent alternatives" to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own "biological assessment for the purpose of identifying any endangered species or threatened species" likely to be affected by agency action. §1536(c)(1). After the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources" which would foreclose the "formulation or implementation of any reasonable and prudent alternative measures" to avoid jeopardizing listed species. §1536(d). These action-forcing procedures are "designed to protect some threatened concrete interest," *ante*, at 573, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court's unsupported conclusion that "[t]his is not a case where plaintiffs

are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs." *Ante*, at 572.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946). The Court never has questioned Congress' authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for "procedural injuries" is another way of saying that Congress may not delegate to the courts authority deemed "executive" in nature. *Ante*, at 577 (Congress may not "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3"). Here Congress seeks not to delegate "executive" power but only to strengthen the procedures it has legislatively mandated. "We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." *Touby* v. *United States*, 500 U. S. 160, 165 (1991). "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or judicial actors*." *Ibid.* (emphasis added).

Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. *INS* v. *Chadha*, 462 U. S. 919, 953–954, n. 16 (1983); *American Power & Light Co.* v. *SEC*, 329 U. S., at 105–106. The Court's intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court's suggestion compelled by our "common understanding of what activities are appropriate to legislatures, to executives, and to courts." *Ante*, at 560. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, this Court has acknowledged "it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process," but "*these procedures are almost certain to affect the agency's substantive decision.*" *Robertson* v. *Methow Valley Citizens Council*, 490 U. S., at 350 (emphasis added). See also *Andrus* v. *Sierra Club*, 442 U. S. 347, 350–351 (1979) ("If environmental concerns are not interwoven into the fabric of agency planning, the 'action-forcing' characteristics of [the environmental-impact statement requirement] would be lost"). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

In short, determining "injury" for Article III standing purposes is a fact-specific inquiry. "Typically . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen* v. *Wright*, 468 U. S., at 752. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress' substantive purpose in imposing a certain procedural requirement. In all events, "[o]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.'" *Mistretta* v. *United States*, 488 U. S. 361, 393 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled "procedural" in nature.

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803).

I dissent.

Syllabus

REPUBLIC OF ARGENTINA ET AL. *v.* WELTOVER, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 91–763. Argued April 1, 1992—Decided June 12, 1992

As part of a plan to stabilize petitioner Argentina's currency, that country and petitioner bank (collectively Argentina) issued bonds, called "Bonods," which provided for repayment in United States dollars through transfer on the market in one of several locations, including New York City. Concluding that it lacked sufficient foreign exchange to retire the Bonods when they began to mature, Argentina unilaterally extended the time for payment and offered bondholders substitute instruments as a means of rescheduling the debts. Respondent bondholders, two Panamanian corporations and a Swiss bank, declined to accept the rescheduling and insisted on repayment in New York. When Argentina refused, respondents brought this breach-of-contract action in the District Court, which denied Argentina's motion to dismiss. The Court of Appeals affirmed, ruling that the District Court had jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1602 *et seq.*, which subjects foreign states to suit in American courts for, *inter alia*, acts taken "in connection with a commercial activity" that have "a direct effect in the United States," § 1605(a)(2).

Held: The District Court properly asserted jurisdiction under the FSIA. Pp. 610–620.

(a) The issuance of the Bonods was a "commercial activity" under the FSIA, and the rescheduling of the maturity dates on those instruments was taken "in connection with" that activity within the meaning of § 1605(a)(2). When a foreign government acts, not as a regulator of a market, but in the manner of a private player within that market, its actions are "commercial" within the meaning of the FSIA. Cf. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 695–706 (plurality opinion). Moreover, because § 1603(d) provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the government's particular actions (whatever the motive behind them) are the *type* of actions by which a private party engages in commerce. The Bonods are in almost all respects garden-variety debt instruments,

and, even when they are considered in full context, there is nothing about their issuance that is not analogous to a private commercial transaction. The fact that they were created to help stabilize Argentina's currency is not a valid basis for distinguishing them from ordinary debt instruments, since, under § 1603(d), it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor. It matters only that it did so. Pp. 612–617.

(b) The unilateral rescheduling of the Bonods had a "direct effect in the United States" within the meaning of § 1605(a)(2). Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in this country: Money that was supposed to have been delivered to a New York bank was not forthcoming. Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to this country is untenable under *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 489. Moreover, assuming that a foreign state may be a "person" for purposes of the Due Process Clause of the Fifth Amendment, Argentina satisfied the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316, by issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city. Pp. 617–620.

941 F. 2d 145, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Richard J. Davis argued the cause for petitioners. With him on the briefs were *Steven Alan Reiss, Bonnie Garone,* and *Andreas F. Lowenfeld.*

Richard W. Cutler argued the cause for respondents. With him on the brief was *Joel I. Klein.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Douglas Letter,* and *Edwin D. Williamson.*

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Republic of Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act taken "in connection with a commercial activity" that had a "direct effect in the United States" so as to subject Argentina to suit in an American court under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1602 *et seq.*

I

Since Argentina's currency is not one of the mediums of exchange accepted on the international market, Argentine businesses engaging in foreign transactions must pay in United States dollars or some other internationally accepted currency. In the recent past, it was difficult for Argentine borrowers to obtain such funds, principally because of the instability of the Argentine currency. To address these problems, petitioners, the Republic of Argentina and its central bank, Banco Central (collectively Argentina), in 1981 instituted a foreign exchange insurance contract program (FEIC), under which Argentina effectively agreed to assume the risk of currency depreciation in cross-border transactions involving Argentine borrowers. This was accomplished by Argentina's agreeing to sell to domestic borrowers, in exchange for a contractually predetermined amount of local currency, the necessary United States dollars to repay their foreign debts when they matured, irrespective of intervening devaluations.

Unfortunately, Argentina did not possess sufficient reserves of United States dollars to cover the FEIC contracts as they became due in 1982. The Argentine Government thereupon adopted certain emergency measures, including refinancing of the FEIC-backed debts by issuing to the creditors government bonds. These bonds, called "Bonods," provide for payment of interest and principal in United States dollars; payment may be made through transfer on the London, Frankfurt, Zurich, or New York market, at the election

of the creditor. Under this refinancing program, the foreign creditor had the option of either accepting the Bonods in satisfaction of the initial debt, thereby substituting the Argentine Government for the private debtor, or maintaining the debtor/creditor relationship with the private borrower and accepting the Argentine Government as guarantor.

When the Bonods began to mature in May 1986, Argentina concluded that it lacked sufficient foreign exchange to retire them. Pursuant to a Presidential Decree, Argentina unilaterally extended the time for payment and offered bondholders substitute instruments as a means of rescheduling the debts. Respondents, two Panamanian corporations and a Swiss bank who hold, collectively, $1.3 million of Bonods, refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made. Argentina did not pay, and respondents then brought this breach-of-contract action in the United States District Court for the Southern District of New York, relying on the Foreign Sovereign Immunities Act of 1976 as the basis for jurisdiction. Petitioners moved to dismiss for lack of subject-matter jurisdiction, lack of personal jurisdiction, and *forum non conveniens*. The District Court denied these motions, 753 F. Supp. 1201 (1991), and the Court of Appeals affirmed, 941 F. 2d 145 (CA2 1991). We granted Argentina's petition for certiorari, which challenged the Court of Appeals' determination that, under the Act, Argentina was not immune from the jurisdiction of the federal courts in this case. 502 U. S. 1024 (1992).

II

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U. S. C. § 1602 *et seq.*, establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state. Under the Act, a "foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the

States" unless one of several statutorily defined exceptions applies. § 1604 (emphasis added). The FSIA thus provides the "sole basis" for obtaining jurisdiction over a foreign sovereign in the United States. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 434–439 (1989). The most significant of the FSIA's exceptions—and the one at issue in this case—is the "commercial" exception of § 1605(a)(2), which provides that a foreign state is not immune from suit in any case

> "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." § 1605(a)(2).

In the proceedings below, respondents relied only on the third clause of § 1605(a)(2) to establish jurisdiction, 941 F. 2d, at 149, and our analysis is therefore limited to considering whether this lawsuit is (1) "based . . . upon an act outside the territory of the United States"; (2) that was taken "in connection with a commercial activity" of Argentina outside this country; and (3) that "cause[d] a direct effect in the United States."[1] The complaint in this case alleges only one cause of action on behalf of each of the respondents, viz., a breach-of-contract claim based on Argentina's attempt to refinance the Bonods rather than to pay them according to their terms. The fact that the cause of action is in compliance with the first of the three requirements—that it is "based upon an act outside the territory of the United

[1] It is undisputed that both the Republic of Argentina and Banco Central are "foreign states" within the meaning of the FSIA. See 28 U. S. C. §§ 1603(a), (b) ("[F]oreign state" includes certain "agenc[ies] or instrumentalit[ies] of a foreign state").

States" (presumably Argentina's unilateral extension)—is uncontested. The dispute pertains to whether the unilateral refinancing of the Bonods was taken "in connection with a commercial activity" of Argentina, and whether it had a "direct effect in the United States." We address these issues in turn.

A

Respondents and their *amicus*, the United States, contend that Argentina's issuance of, and continued liability under, the Bonods constitute a "commercial activity" and that the extension of the payment schedules was taken "in connection with" that activity. The latter point is obvious enough, and Argentina does not contest it; the key question is whether the activity is "commercial" under the FSIA.

The FSIA defines "commercial activity" to mean:

> "[E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U. S. C. § 1603(d).

This definition, however, leaves the critical term "commercial" largely undefined: The first sentence simply establishes that the commercial nature of an activity does *not* depend upon whether it is a single act or a regular course of conduct; and the second sentence merely specifies what element of the conduct determines commerciality (*i. e.*, nature rather than purpose), but still without saying what "commercial" means. Fortunately, however, the FSIA was not written on a clean slate. As we have noted, see *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486–489 (1983), the Act (and the commercial exception in particular) largely codifies the so-called "restrictive" theory of foreign sovereign immunity first endorsed by the State Department in 1952. The meaning of "commercial" is the meaning generally attached to that

term under the restrictive theory at the time the statute was enacted. See *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337, 342 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning"); *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981); *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

This Court did not have occasion to discuss the scope or validity of the restrictive theory of sovereign immunity until our 1976 decision in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682. Although the Court there was evenly divided on the question whether the "commercial" exception that applied in the foreign-sovereign-immunity context also limited the availability of an act-of-state defense, compare *id.*, at 695–706 (plurality opinion), with *id.*, at 725–730 (Marshall, J., dissenting), there was little disagreement over the general scope of the exception. The plurality noted that, after the State Department endorsed the restrictive theory of foreign sovereign immunity in 1952, the lower courts consistently held that foreign sovereigns were not immune from the jurisdiction of American courts in cases "arising out of purely commercial transactions," *id.*, at 703, citing, *inter alia*, *Victory Transport, Inc.* v. *Comisaria General*, 336 F. 2d 354 (CA2 1964), cert. denied, 381 U. S. 934 (1965), and *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F. 2d 103 (CA2), cert. denied, 385 U. S. 931 (1966). The plurality further recognized that the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other, was not entirely novel to American law. See 425 U. S., at 695–696, citing, *inter alia*, *Parden* v. *Terminal Railway of Alabama Docks Dept.*, 377 U. S. 184, 189–190 (1964) (Eleventh Amendment immunity); *Bank of United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 907–908 (1824) (same); *New York* v. *United States*, 326 U. S. 572, 579 (1946) (opinion of Frankfurter, J.) (tax immunity of States); and *South Carolina* v. *United States*, 199 U. S. 437, 461–463 (1905) (same). The plurality

stated that the restrictive theory of foreign sovereign immunity would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation. 425 U. S., at 698–705. A foreign state engaging in "commercial" activities "do[es] not exercise powers peculiar to sovereigns"; rather, it "exercise[s] only those powers that can also be exercised by private citizens." *Id.*, at 704. The dissenters did not disagree with this general description. See *id.*, at 725. Given that the FSIA was enacted less than six months after our decision in *Alfred Dunhill* was announced, we think the plurality's contemporaneous description of the then-prevailing restrictive theory of sovereign immunity is of significant assistance in construing the scope of the Act.

In accord with that description, we conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U. S. C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce," Black's Law Dictionary 270 (6th ed. 1990). See, *e. g.*, *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*, 877 F. 2d 574, 578 (CA7), cert. denied, 493 U. S. 937 (1989). Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts

to acquire goods, see, *e. g.*, *Stato di Rumania* v. *Trutta*, [1926] Foro It. I 584, 585–586, 589 (Corte di Cass. del Regno, Italy), translated and reprinted in part in 26 Am. J. Int'l L. 626–629 (Supp. 1932).

The commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income. We recognize that, prior to the enactment of the FSIA, there was authority suggesting that the issuance of public debt instruments did not constitute a commercial activity. *Victory Transport*, 336 F. 2d, at 360 (dicta). There is, however, nothing distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*, and in this regard it is significant that *Victory Transport* expressed confusion as to whether the "nature" or the "purpose" of a transaction was controlling in determining commerciality, *id.*, at 359–360. Because the FSIA has now clearly established that the "nature" governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.

Argentina contends that, although the FSIA bars consideration of "purpose," a court must nonetheless fully consider the *context* of a transaction in order to determine whether it is "commercial." Accordingly, Argentina claims that the Court of Appeals erred by defining the relevant conduct in what Argentina considers an overly generalized, acontextual manner and by essentially adopting a *per se* rule that all "issuance of debt instruments" is "commercial." See 941 F. 2d, at 151 ("'[I]t is self-evident that issuing public debt is a commercial activity within the meaning of [the FSIA]'"), quoting *Shapiro* v. *Republic of Bolivia*, 930 F. 2d 1013, 1018 (CA2 1991). We have no occasion to consider such a *per se* rule, because it seems to us that even in full context, there

is nothing about the issuance of these Bonods (except perhaps its purpose) that is not analogous to a private commercial transaction.

Argentina points to the fact that the transactions in which the Bonods were issued did not have the ordinary commercial consequence of raising capital or financing acquisitions. Assuming for the sake of argument that this is not an example of judging the commerciality of a transaction by its purpose, the ready answer is that private parties regularly issue bonds, not just to raise capital or to finance purchases, but also to refinance debt. That is what Argentina did here: By virtue of the earlier FEIC contracts, Argentina was *already* obligated to supply the United States dollars needed to retire the FEIC-insured debts; the Bonods simply allowed Argentina to restructure its existing obligations. Argentina further asserts (without proof or even elaboration) that it "received consideration [for the Bonods] in no way commensurate with [their] value," Brief for Petitioners 22. Assuming that to be true, it makes no difference. Engaging in a commercial act does not require the receipt of fair value, or even compliance with the common-law requirements of consideration.

Argentina argues that the Bonods differ from ordinary debt instruments in that they "were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange." *Id.*, at 23–24. In this regard, Argentina relies heavily on *De Sanchez* v. *Banco Central de Nicaragua*, 770 F. 2d 1385 (1985), in which the Fifth Circuit took the view that "[o]ften, the essence of an act is defined by its purpose"; that unless "we can inquire into the purposes of such acts, we cannot determine their nature"; and that, in light of its purpose to control its reserves of foreign currency, Nicaragua's refusal to honor a check it had issued to cover a private bank debt was a

sovereign act entitled to immunity. *Id.*, at 1393. Indeed, Argentina asserts that the line between "nature" and "purpose" rests upon a "formalistic distinction [that] simply is neither useful nor warranted." Reply Brief for Petitioners 8. We think this line of argument is squarely foreclosed by the language of the FSIA. However difficult it may be in some cases to separate "purpose" (*i. e.*, the *reason* why the foreign state engages in the activity) from "nature" (*i. e.*, the outward form of the conduct that the foreign state performs or agrees to perform), see *De Sanchez*, *supra*, at 1393, the statute unmistakably commands that to be done, 28 U. S. C. § 1603(d). We agree with the Court of Appeals, see 941 F. 2d, at 151, that it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so. We conclude that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA.

B

The remaining question is whether Argentina's unilateral rescheduling of the Bonods had a "direct effect" in the United States, 28 U. S. C. § 1605(a)(2). In addressing this issue, the Court of Appeals rejected the suggestion in the legislative history of the FSIA that an effect is not "direct" unless it is both "substantial" and "foreseeable." 941 F. 2d, at 152; contra, *America West Airlines, Inc.* v. *GPA Group, Ltd.*, 877 F. 2d 793, 798–800 (CA9 1989); *Zernicek* v. *Brown & Root, Inc.*, 826 F. 2d 415, 417–419 (CA5 1987), cert. denied, 484 U. S. 1043 (1988); *Maritime Int'l Nominees Establishment* v. *Republic of Guinea*, 224 U. S. App. D. C. 119, 135–136, 693 F. 2d 1094, 1110–1111 (1982), cert. denied, 464 U. S. 815 (1983); *Ohntrup* v. *Firearms Center Inc.*, 516 F. Supp. 1281, 1286 (ED Pa. 1981), aff'd, 760 F. 2d 259 (CA3 1985). That suggestion is found in the House Report, which states that conduct covered by the third clause of § 1605(a)(2) would be subject to the jurisdiction of American courts "consistent with principles set forth in section 18, Restatement of the

Law, Second, Foreign Relations Law of the United States (1965)." H. R. Rep. No. 94–1487, p. 19 (1976). Section 18 states that American laws are not given extraterritorial application except with respect to conduct that has, as a "direct and foreseeable result," a "substantial" effect within the United States. Since this obviously deals with jurisdiction to *legislate* rather than jurisdiction to *adjudicate*, this passage of the House Report has been charitably described as "a bit of a *non sequitur*," *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F. 2d 300, 311 (CA2 1981), cert. denied, 454 U. S. 1148 (1982). Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States. But we reject the suggestion that § 1605(a)(2) contains any unexpressed requirement of "substantiality" or "foreseeability." As the Court of Appeals recognized, an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." 941 F. 2d, at 152.

The Court of Appeals concluded that the rescheduling of the maturity dates obviously had a "direct effect" on respondents. It further concluded that that effect was sufficiently "in the United States" for purposes of the FSIA, in part because "Congress would have wanted an American court to entertain this action" in order to preserve New York City's status as "a preeminent commercial center." *Id.*, at 153. The question, however, is not what Congress "would have wanted" but what Congress enacted in the FSIA. Although we are happy to endorse the Second Circuit's recognition of "New York's status as a world financial leader," the effect of Argentina's rescheduling in diminishing that status (assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the "direct effect" requirement of the FSIA. *Ibid.*

We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the

Bonods had a "direct effect" in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. We reject Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States. We expressly stated in *Verlinden* that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied," 461 U. S., at 489.

Finally, Argentina argues that a finding of jurisdiction in this case would violate the Due Process Clause of the Fifth Amendment, and that, in order to avoid this difficulty, we must construe the "direct effect" requirement as embodying the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945).[2] Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 323–324 (1966) (States of the Union are not "persons" for purposes of the Due Process Clause), we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test. By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that

[2] Argentina concedes that this issue "is before the Court only as an aid in interpreting the direct effect requirement of the Act" and that "[w]hether there is a constitutional basis for personal jurisdiction over [Argentina] is not before the Court as an independent question." Brief for Petitioners 36, n. 33.

city, Argentina "'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462, 475 (1985), quoting *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958).

* * *

We conclude that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA; that its rescheduling of the maturity dates on those instruments was taken in connection with that commercial activity and had a "direct effect" in the United States; and that the District Court therefore properly asserted jurisdiction, under the FSIA, over the breach-of-contract claim based on that rescheduling. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Syllabus

FEDERAL TRADE COMMISSION *v.* TICOR TITLE INSURANCE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91–72. Argued January 13, 1992—Decided June 12, 1992

Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of § 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue—Connecticut, Wisconsin, Arizona, and Montana—uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative Law Judge held, *inter alia*, that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive activities were entitled to state-action immunity, as contemplated in *Parker* v. *Brown*, 317 U. S. 341, and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105. The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

Held:

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp. 632–640.

(a) Principles of federalism require that federal antitrust laws be subject to supersession by state regulatory programs. *Parker*, *supra*, at 350–352; *Midcal*, *supra*; *Patrick* v. *Burget*, 486 U. S. 94. *Midcal*'s two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing

regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior preemption authority here. Pp. 632–635.

(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between *Midcal*'s two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. Pp. 635–637.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See *Patrick*, *supra*, at 103–105. This Court's decision in *Southern Motor Carriers Rate Con-*

Syllabus

ference, Inc. v. *United States*, 471 U. S. 48, which involved a similar negative option regime, is not to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 637–640.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P. 640.

922 F. 2d 1122, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 640. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 641. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 646.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Rill, Robert A. Long, Jr., James M. Spears, Jay C. Shaffer, Ernest J. Isenstadt, Michael E. Antalics*, and *Ann Malester*.

John C. Christie, Jr., argued the cause for respondents. With him on the brief were *Patrick J. Roach, John F. Graybeal*, and *David M. Foster*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Wisconsin et al. by *James E. Doyle*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Robert N. McDonald* and *Ellen S. Cooper*, Assistant Attorneys General, *James H. Evans*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, and *James Forbes*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, and *Jeri K. Auther*, Assistant Attorney General, *Winston Bryant*, Attorney General of Arkansas, and *Royce Griffin*, Deputy Attorney General, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Larry EchoHawk*, Attorney General of Idaho, and *Brett T. DeLange*, Deputy Attorney General, *Bonnie J. Campbell*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Frederic J. Cowan*, Attorney General of Kentucky, and *James*

JUSTICE KENNEDY delivered the opinion of the Court.

The Federal Trade Commission filed an administrative complaint against six of the Nation's largest title insurance

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M. Ringo, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Jesse James Marks* and *Anne F. Benoit*, Assistant Attorneys General, *Michael E. Carpenter*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *Scott Harshbarger*, Attorney General of Massachusetts, and *George K. Weber* and *Thomas M. Alpert*, Assistant Attorneys General, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *Marc Racicot*, Attorney General of Montana, *Frankie Sue Del Papa*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Charles T. Putnam*, Senior Assistant Attorney General, and *Walter L. Maroney*, Assistant Attorney General, *Robert J. Del Tufo*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, *Robert Abrams*, Attorney General of New York, *Jerry Boone*, Solicitor General, and *George W. Sampson* and *Richard Schwartz*, Assistant Attorneys General, *Lacy H. Thornburg*, Attorney General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, and *David W. Huey*, Assistant Attorney General, *Lee Fisher*, Attorney General of Ohio, and *Marc B. Bandman*, Assistant Attorney General, *Susan B. Loving*, Attorney General of Oklahoma, and *Jane F. Wheeler*, Assistant Attorney General, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Thomas L. Welch*, Chief Deputy Attorney General, and *Carl S. Hisiro*, Assistant Chief Deputy Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, and *Edmund F. Murray, Jr.*, Special Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, *John Knox Walkup*, Solicitor General, and *Perry A. Craft*, Deputy Attorney General, *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Mark Tobey*, Assistant Attorney General, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Geoffrey A. Yudien*, Assistant Attorney General, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Carol A. Smith*, Assistant Attorney General, *Mario J. Palumbo*, Attorney General of West Virginia, and *Donald L. Darling*, Deputy Attorney General, and *Joseph B. Meyer*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California,

companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 15 U. S. C. § 45(a)(1), which prohibits "[u]nfair methods of competition in or affecting commerce." One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker* v. *Brown*, 317 U. S. 341 (1943). The Commission rejected this defense, *In re Ticor Title Ins. Co.*, 112 F. T. C. 344 (1989), and the firms sought review in the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. 922 F. 2d 1122 (1991). We granted certiorari. 502 U. S. 806 (1991).

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance

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Roderick E. Walston, Chief Assistant Attorney General, and *Thomas F. Gede*, Special Assistant Attorney General, *Gale A. Norton*, Attorney General of Colorado, *Don Stenberg*, Attorney General of Nebraska, and *Mark W. Barnett*, Attorney General of South Dakota; for the American Insurance Association et al. by *John E. Nolan*, *Craig A. Berrington*, *James H. Bradner, Jr.*, *Theresa L. Sorota*, and *Patrick J. McNally*; for Hartford Fire Insurance Co. et al. by *Stephen M. Shapiro*, *Mark I. Levy*, *Andrew J. Pincus*, and *Roy T. Englert, Jr.*; and for the National Council on Compensation Insurance by *Jerome A. Hochberg* and *Mark E. Solomons*.

Briefs of *amici curiae* were filed for the American Land Title Association by *Philip H. Rudolph* and *James R. Maher*; and for the Pennsylvania Electric Association by *Jeffrey H. Howard*.

policy, the insurance company or one of its agents performs a title search and examination. The search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $1.35 billion in gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. App. to Pet. for Cert. 145a.

The Commission issued an administrative complaint in 1985. Horizontal price fixing was alleged in these terms:

> "'Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.'" 112 F. T. C., at 346.

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 59 Stat. 34, 15 U. S. C. § 1012(b), which confers antitrust immunity over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the *Noerr-Pennington* doctrine, which places certain "[j]oint efforts to influence public officials" beyond the reach of the antitrust laws. *Mine Workers* v. *Pennington*, 381 U. S. 657, 670 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 136 (1961). Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized and supervised by state officials. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445

U. S. 97 (1980); *Parker* v. *Brown*, 317 U. S. 341 (1943). App. to Pet. for Cert. 218a. As to one State, Ohio, respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in 13 States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States: Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran-Ferguson and *Noerr-Pennington* defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in

efficiencies and costs among individual members. App. to Pet. for Cert. 183a–184a.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circumstances behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high. *Id.*, at 189a–195a.

In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect. *Id.*, at 196a–200a.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following conclusion in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments. *Id.*, at 200a–205a.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished. *Id.*, at 211a–214a.

To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble-damages suits, so by the time the Commission filed its formal complaint in 1985, the rating bureaus had been dismantled. *Id.*, at 195a, 200a, 205a, 208a. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. *Id.*, at 246a–247a. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. *Id.*, at 105. The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the immunity question, beginning with the hearings before the ALJ and in all later proceedings, has turned upon the proper interpretation and application of *Midcal*'s active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin. App. to Pet. for Cert. 248a.

On review of the ALJ's decision, the Commission held that none of the four States had conducted sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. *Id.*, at 47a. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F. 2d 1064 (1990), which

had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. *Id.*, at 1071. Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four States and held that the respondents' conduct was entitled to state-action immunity in each of them. 922 F. 2d, at 1140.

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. Against this background, in *Parker* v. *Brown*, 317 U. S. 341 (1943), we upheld a state-supervised, market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regula-

tory programs. Our decision was grounded in principles of federalism. *Id.*, at 350–352.

The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal*, *supra*, and *Patrick* v. *Burget*, 486 U. S. 94 (1988). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade to sell below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price-fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." 445 U. S., at 105 (internal quotation marks omitted). *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick* v. *Burget*. In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative

policies, as distinct from allowing private parties to foreclose competition, in the following passage:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. . . . The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 486 U. S., at 100–101 (internal quotation marks and citations omitted).

Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id.*, at 106.

Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not

simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45. See U. S. Bureau of Consumer Protection, Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures, Chs. VI(B) and (C) (1975); see also Note, The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 89 Harv. L. Rev. 715 (1976). A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, Antitrust Law ¶ 218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission does not assert any superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regu-

late their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See *Patrick*, 486 U. S., at 105. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. See *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, 596 (1976). So we have held that state-action immunity is disfavored, much as are repeals by implication. *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 398–399 (1978). By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. See *Patrick*, *supra*, at 100. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inad-

vertence; it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

> "'Where . . . the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" 922 F. 2d, at 1136, quoting *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F. 2d, at 1071.

Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four States, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. 922 F. 2d, at 1140.

While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning

point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

Respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And as in *Patrick*, the availability of state judicial review could not fill the void. Because of the state agencies' limited role and

participation, state judicial review was likewise limited. See *Patrick*, 486 U. S., at 103–105.

Our decision in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48 (1985), though it too involved a negative option regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. *Id.*, at 62, 66. The concession was against the background of a District Court determination that, although submitted rates could go into effect without further state activity, the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point. See *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476–477 (ND Ga. 1979). In the case before us, of course, the Commission concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the ratesetting scheme.

This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 434, n. 16 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. Cf. *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991) (city billboard zoning ordinance entitled to state-action immunity). We do

not have before us a case in which governmental actors made unilateral decisions without participation by private actors. Cf. *Fisher* v. *Berkeley*, 475 U. S. 260 (1986) (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. Cf. *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 344, n. 6 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts of respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think THE CHIEF JUSTICE and JUSTICE O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total aban-

donment of some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative option" context, but even in a context such as that involved in *Patrick* v. *Burget*, 486 U. S. 94 (1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.

I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker* v. *Brown*, 317 U. S. 341 (1943), exemption for state-programmed private collusion in the first place.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state-action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Because this standard is neither supported by our prior precedent nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state-action doctrine was first established in *Parker* v. *Brown*, 317 U. S. 341 (1943). As noted by the majority, in *Parker* we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." *Id.*,

at 351.[1] "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 56 (1985) (footnote omitted).

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). We held in *Midcal* that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id.*, at 105 (internal quotation marks and citation omitted). In *Midcal*, we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "[t]he State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100. We noted that the state-action defense does not allow the States to authorize what is nothing more than private price fixing. *Id.*, at 105.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state-action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken

[1] The Court states that "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," *ante*, at 632. However, in *Parker*, we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

by the private actors facing antitrust liability.[2] Our most recent formulation of the "active supervision" requirement was announced in *Patrick* v. *Burget*, 486 U. S. 94 (1988), where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*, at 101. Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority—"power"—to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the State's regulation was not sufficiently detailed or rigorous.

Addressing this question, the Court of Appeals in this case used the following analysis:

> "'Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" 922 F. 2d 1122, 1136 (CA3 1991), quoting *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F. 2d 1064, 1071 (CA1 1990).

The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is

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[2] In *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335 (1987), we held that a New York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. *324 Liquor, supra*, at 345.

much more closely attuned to our "have and exercise power" formulation in *Patrick* v. *Burget* than is the rule adopted by the Court today. The Court simply does not say just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Any other formulation, we are told, will remove the active supervision requirement altogether as a practical matter.

I do not believe this to be the case.[3] In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie* v. *Eau Claire*, 471 U. S. 34, 46 (1985).

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante*, at 636. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn *lessens* the States' regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing.

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[3] The state regulatory programs in *Midcal*, *supra*, *Patrick* v. *Burget*, 486 U. S. 94 (1988), and *324 Liquor*, *supra*, would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

Southern Motor Carriers Rate Conference, Inc. v. *United States*, *supra*, at 51. The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante*, at 636. A State must establish, staff, and fund a program to approve jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws.[4]

The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Ante*, at 638.[5] Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante*, at 637. The Court maintains that the proper state-action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante*, at 634. But the Court's focus on the actions taken by state regulators, *i. e.*, the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active—surely a normative judgment.

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[4] In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct would application of a less detailed active supervision test change the result. In *Patrick* v. *Burget*, *supra*, we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976), it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

[5] It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state-action doctrine.

The Court of Appeals found—properly, in my view—that while the States at issue here did not regulate respondents' rates with the vigor petitioner would have liked, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Federal Trade Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States' regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior—which the Federal Trade Commission concedes was the case here—and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante,* at 635. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case *could have* supervised respondents' joint ratemaking; rather, it argues that "the potential for state super-

vision was not realized in fact." *Ante*, at 638. Such an after-the-fact evaluation of a State's exercise of its supervisory powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "pla[y] a substantial role in determining the specifics of the economic policy." *Ante*, at 635. That standard is not only ambiguous, but also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

Syllabus

BURLINGTON NORTHERN RAILROAD CO. *v.* FORD ET AL.

CERTIORARI TO THE SUPREME COURT OF MONTANA

No. 91–779. Argued April 20, 1992—Decided June 12, 1992

Respondents sued petitioner, their employer, under the Federal Employers' Liability Act in the state court in Yellowstone County, Montana. That court denied petitioner's motions to change venue to Hill County, where petitioner claimed to have its principal place of business in Montana. The State Supreme Court affirmed, ruling that Montana's venue rules—which permit a plaintiff to sue a corporation incorporated in that State only in the county of its principal place of business, but permit suit in any county against a corporation, like petitioner, that is incorporated elsewhere—do not work a discrimination violating the Fourteenth Amendment's Equal Protection Clause.

Held: The distinction in treatment contained in Montana's venue rules does not offend the Equal Protection Clause. Those rules neither deprive petitioner of a fundamental right nor classify along suspect lines like race or religion, and are valid because they can be understood as rationally furthering a legitimate state interest: adjustment of the disparate interests of parties to a lawsuit in the place of trial. Montana could reasonably determine that only the convenience to a corporate defendant of litigating in the county of its home office outweighs a plaintiff's interest in suing in the county of his choice. Petitioner has not shown that the Montana venue rules' hinging on State of incorporation rather than domicile makes them so underinclusive or overinclusive as to be irrational. Besides, petitioner, being domiciled outside Montana, would not benefit from a rule turning on domicile, and therefore cannot complain of a rule hinging on State of incorporation. *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, distinguished. Pp. 650–654.

250 Mont. 188, 819 P. 2d 169, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

Betty Jo Christian argued the cause for petitioner. With her on the briefs were *Charles G. Cole, Jerald S. Howe, Jr., Virginia L. White-Mahaffey, Edmund W. Burke,* and *Richard V. Wicka.*

Joel I. Klein argued the cause for respondents. With him on the brief was *Robert S. Fain, Jr.**

JUSTICE SOUTER delivered the opinion of the Court.

Montana's venue rules permit a plaintiff to sue a corporation incorporated in that State only in the county of its principal place of business, but permit suit in any county against a corporation incorporated elsewhere. This case presents the question whether the distinction in treatment offends the Equal Protection Clause of the Fourteenth Amendment, U. S. Const., Amdt. 14, § 1. We hold that it does not.

Respondents William D. Ford and Thomas L. Johnson were employed by petitioner Burlington Northern Railroad Company, a corporation owing its existence to the laws of Delaware and having a principal place of business in Fort Worth, Texas. Ford and Johnson raised a claim under the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, and brought suit in the state trial court for Yellowstone County, Montana, alleging injuries sustained while working at Burlington's premises in Sheridan, Wyoming. In each case, Burlington moved to change venue to Hill County, Montana, where it claimed to have its principal place of business in that State. The trial court denied each motion, and Burlington brought interlocutory appeals.

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*Briefs of *amici curiae* urging reversal were filed for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar;* and for the Association of American Railroads by *John H. Broadley, David W. Ogden,* and *Robert W. Blanchette.*

Briefs of *amici curiae* urging affirmance were filed for the State of Montana et al. by *Marc Racicot,* Attorney General of Montana, and *Elizabeth S. Baker,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Tom Udall* of New Mexico, *Nicholas J. Spaeth* of North Dakota, *Mark Barnett* of South Dakota, *Dan Morales* of Texas, and *Joseph B. Meyer* of Wyoming; and for the Montana Trial Lawyers Association by *Alexander Blewett III* and *W. William Leaphart.*

The Supreme Court of Montana consolidated the two cases and affirmed the decisions of the trial court. 250 Mont. 188, 819 P. 2d 169 (1991). Under the Montana venue rules, the court said, a foreign corporation may be sued in any of Montana's counties. *Id.*, at 190, 819 P. 2d, at 171. The court rejected Burlington's argument that the State's venue rules worked a discrimination violating the Fourteenth Amendment's Equal Protection Clause. The Montana venue rules, the court explained, were subject merely to rational-basis review, *id.*, at 193, 819 P. 2d, at 173, which was satisfied, at least in these cases, by the consonance of the rules with federal policy, embodied in FELA, of facilitating recovery by injured railroad workers, *id.*, at 194–195, 819 P. 2d, at 173–174. Besides, the court said, Montana's venue rules did not even discriminate against Burlington, since Ford and Johnson could have sued the corporation in the Federal District Court for Montana, which sits in Yellowstone County, among other places. *Id.*, at 197, 819 P. 2d, at 175. We granted certiorari, 502 U. S. 1070 (1992), and, although our reasoning differs from that of the State Supreme Court, now affirm.*

A Montana statute provides that "the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action." Mont. Code Ann. § 25–2–118(1) (1991). But, "if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint." § 25–2–118(2). The Supreme Court of Montana has long held that a corporation does not "reside in the state" for venue purposes unless Montana is its State of incorporation, see, *e. g.*, *Haug* v. *Burlington Northern R. Co.*, 236 Mont. 368, 371, 770 P. 2d 517, 519 (1989); *Foley* v. *General Motors Corp.*, 159 Mont. 469, 472–473, 499 P. 2d 774, 776 (1972); *Hanlon* v. *Great Northern R. Co.*, 83 Mont. 15, 21, 268 P. 547, 549 (1928); *Pue* v. *Northern Pacific R. Co.*, 78 Mont. 40, 43, 252 P. 313, 315

*The decision below is final for purposes of 28 U. S. C. § 1257(a). See *American Motorists Ins. Co.* v. *Starnes*, 425 U. S. 637, 642, n. 3 (1976).

(1926), and that a Montana corporation resides in the Montana county in which it has its principal place of business, see, *e. g.*, *Mapston* v. *Joint School District No. 8*, 227 Mont. 521, 523, 740 P. 2d 676, 677 (1987); *Platt* v. *Sears, Roebuck & Co.*, 222 Mont. 184, 187, 721 P. 2d 336, 338 (1986). In combination, these venue rules, with exceptions not here relevant, permit a plaintiff to sue a domestic company in just the one county where it has its principal place of business, while a plaintiff may sue a foreign corporation in any of the State's 56 counties. Burlington claims the distinction offends the Equal Protection Clause.

The Fourteenth Amendment forbids a State to "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. Because the Montana venue rules neither deprive Burlington of a fundamental right nor classify along suspect lines like race or religion, they do not deny equal protection to Burlington unless they fail in rationally furthering legitimate state ends. See, *e. g.*, *United States* v. *Sperry Corp.*, 493 U. S. 52, 64 (1989); *Dallas* v. *Stanglin*, 490 U. S. 19, 25 (1989).

Venue rules generally reflect equity or expediency in resolving disparate interests of parties to a lawsuit in the place of trial. See, *e. g.*, *Citizens & Southern Nat. Bank* v. *Bougas*, 434 U. S. 35, 44, n. 10 (1977); *Denver & R. G. W. R. Co.* v. *Trainmen*, 387 U. S. 556, 560 (1967); *Van Dusen* v. *Barrack*, 376 U. S. 612, 623 (1964); F. James & G. Hazard, Civil Procedure 47 (3d ed. 1985). The forum preferable to one party may be undesirable to another, and the adjustment of such warring interests is a valid state concern. Cf. *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 178 (1980). In striking the balance between them, a State may have a number of choices, any of which would survive scrutiny, each of them passable under the standard tolerating some play in the joints of governmental machinery. See *Bain Peanut Co. of Texas* v. *Pinson*, 282 U. S. 499, 501 (1931). Thus, we have no doubt that a State would act within its

constitutional prerogatives if it were to give so much weight to the interests of plaintiffs as to allow them to sue in the counties of their choice under all circumstances. It is equally clear that a State might temper such an "any county" rule to the extent a reasonable assessment of defendants' interests so justified.

Here, Montana has decided that the any-county rule should give way to a single-county rule where a defendant resides in Montana, arguably on the reasonable ground that a defendant should not be subjected to a plaintiff's tactical advantage of forcing a trial far from the defendant's residence. At the same time, Montana has weighed the interest of a defendant who does not reside in Montana differently, arguably on the equally reasonable ground that for most nonresident defendants the inconvenience will be great whether they have to defend in, say, Billings or Havre. See *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 498 (1927) (Holmes, J., dissenting). Montana could thus have decided that a nonresident defendant's interest in convenience is too slight to outweigh the plaintiff's interest in suing in the forum of his choice.

Burlington does not, indeed, seriously contend that such a decision is constitutionally flawed as applied to individual nonresident defendants. Nor does it argue that such a rule is unconstitutional even when applied to corporate defendants without a fixed place of business in Montana. Burlington does claim, however, that the rule is unconstitutional as applied to a corporate defendant like Burlington that not only has its home office in some other State or country, but also has a place of business in Montana that would qualify as its "principal place of business" if it were a Montana corporation.

Burlington's claim fails. Montana could reasonably have determined that a corporate defendant's home office is generally of greater significance to the corporation's convenience in litigation than its other offices, that foreign corporations

are unlikely to have their principal offices in Montana, and that Montana's domestic corporations will probably keep headquarters within the State. We cannot say, at least not on this record, that any of these assumptions is irrational. Cf. *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 410 (1982); *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 585 (1935). And upon them Montana may have premised the policy judgment, which we find constitutionally unimpeachable, that only the convenience to a corporate defendant of litigating in the county containing its home office is sufficiently significant to outweigh a plaintiff's interest in suing in the county of his choice.

Of course Montana's venue rules would have implemented that policy judgment with greater precision if they had turned on the location of a corporate defendant's principal place of business, not on its State of incorporation. But this is hardly enough to make the rules fail rational-basis review, for "rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976); see *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 814 (1976); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911). Montana may reasonably have thought that the location of a corporate defendant's principal place of business would not be as readily verifiable as its State of incorporation, that a rule hinging on the former would invite wasteful sideshows of venue litigation, and that obviating the sideshows would be worth the loss in precision. These possibilities, of course, put Burlington a far cry away from the point of discharging its burden of showing that the underinclusiveness and overinclusiveness of Montana's venue rules is so great that the rules can no longer be said rationally to implement Montana's policy judgment. See, *e. g.*, *Brownell*, *supra*, at 584. Besides, Burlington, having headquarters elsewhere, would not benefit even from a scheme based on domicile, and is therefore in no position to complain of Montana's using State of incorporation as a surrogate for

domicile. See *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 53–55 (1926); cf. *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Burlington is left with the argument that *Power Manufacturing Co.* v. *Saunders*, *supra*, controls this case. But it does not. In *Saunders*, we considered Arkansas' venue rules, which restricted suit against a domestic corporation to those counties where it maintained a place of business, 274 U. S., at 491–492, but exposed foreign corporations to suit in any county, *id.*, at 492. We held that the distinction lacked a rational basis and therefore deprived foreign corporate defendants of the equal protection of the laws. *Id.*, at 494. The statutory provision challenged in *Saunders*, however, applied only to foreign corporations authorized to do business in Arkansas, *ibid.*, so that most of the corporations subject to its any-county rule probably had a place of business in Arkansas. In contrast, most of the corporations subject to Montana's any-county rule probably do not have their principal place of business in Montana. Thus, Arkansas' special rule for foreign corporations was tailored with significantly less precision than Montana's, and, on the assumption that *Saunders* is still good law, see *American Motorists Ins. Co.* v. *Starnes*, 425 U. S. 637, 645, n. 6 (1976), its holding does not invalidate Montana's venue rules.

In sum, Montana's venue rules can be understood as rationally furthering a legitimate state interest. The judgment of the Supreme Court of Montana is accordingly

Affirmed.

Syllabus

UNITED STATES *v.* ALVAREZ-MACHAIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–712. Argued April 1, 1992—Decided June 15, 1992

Respondent, a citizen and resident of Mexico, was forcibly kidnaped from his home and flown by private plane to Texas, where he was arrested for his participation in the kidnaping and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot. After concluding that DEA agents were responsible for the abduction, the District Court dismissed the indictment on the ground that it violated the Extradition Treaty between the United States and Mexico (Extradition Treaty or Treaty), and ordered respondent's repatriation. The Court of Appeals affirmed. Based on one of its prior decisions, the court found that, since the United States had authorized the abduction and since the Mexican Government had protested the Treaty violation, jurisdiction was improper.

Held: The fact of respondent's forcible abduction does not prohibit his trial in a United States court for violations of this country's criminal laws. Pp. 659–670.

(a) A defendant may not be prosecuted in violation of the terms of an extradition treaty. *United States* v. *Rauscher*, 119 U. S. 407. However, when a treaty has not been invoked, a court may properly exercise jurisdiction even though the defendant's presence is procured by means of a forcible abduction. *Ker* v. *Illinois*, 119 U. S. 436. Thus, if the Extradition Treaty does not prohibit respondent's abduction, the rule of *Ker* applies and jurisdiction was proper. Pp. 659–662.

(b) Neither the Treaty's language nor the history of negotiations and practice under it supports the proposition that it prohibits abductions outside of its terms. The Treaty says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs. In addition, although the Mexican Government was made aware of the *Ker* doctrine as early as 1906, and language to curtail *Ker* was drafted as early as 1935, the Treaty's current version contains no such clause. Pp. 663–666.

(c) General principles of international law provide no basis for interpreting the Treaty to include an implied term prohibiting international abductions. It would go beyond established precedent and practice to draw such an inference from the Treaty based on respondent's argument that abductions are so clearly prohibited in international law that there

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was no reason to include the prohibition in the Treaty itself. It was the practice of nations with regard to extradition treaties that formed the basis for this Court's decision in *Rauscher, supra,* to imply a term in the extradition treaty between the United States and England. Respondent's argument, however, would require a much larger inferential leap with only the most general of international law principles to support it. While respondent may be correct that his abduction was "shocking" and in violation of general international law principles, the decision whether he should be returned to Mexico, as a matter outside the Treaty, is a matter for the Executive Branch. Pp. 666–670.

946 F. 2d 1466, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, *post,* p. 670.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Mueller, Deputy Solicitor General Bryson, Michael R. Dreeben,* and *Kathleen A. Felton.*

Paul L. Hoffman argued the cause for respondent. With him on the brief were *Ralph G. Steinhardt, Robin S. Toma, Mark D. Rosenbaum, John A. Powell, Steven R. Shapiro, Kate Martin,* and *Robert Steinberg.**

**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Government of Canada by *Axel Kleiboemer;* for the United Mexican States by *Bruno A. Ristau* and *Michael Abbell;* for the Allard K. Lowenstein International Human Rights Clinic et al. by *Harold Hongju Koh, Michael Ratner, Peter Weiss,* and *David Cole;* for the Association of the Bar of the City of New York by *Sidney S. Rosdeitcher;* for the International Human Rights Law Group by *Paul Nielson* and *Steven M. Schneebaum;* for the Lawyers Committee for Human Rights by *Ruth Wedgwood;* for the Minnesota Lawyers International Human Rights Committee by *David S. Weissbrodt;* and for Rene Martin Verdugo-Urquidez by *Patrick Q. Hall* and *Charles L. Goldberg.*

Kenneth Roth and *Stephen M. Kristovich* filed a brief for Americas Watch as *amicus curiae.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.

Respondent, Humberto Alvarez-Machain, is a citizen and resident of Mexico. He was indicted for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar.[1] The DEA believes that respondent, a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him. On April 2, 1990, respondent was forcibly kidnaped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it. *United States* v. *Caro-Quintero*, 745 F. Supp. 599, 602–604, 609 (CD Cal. 1990).[2]

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[1] Respondent is charged in a sixth superseding indictment with: conspiracy to commit violent acts in furtherance of racketeering activity (in violation of 18 U. S. C. §§ 371, 1959); committing violent acts in furtherance of racketeering activity (in violation of § 1959(a)(2)); conspiracy to kidnap a federal agent (in violation of §§ 1201(a)(5), (c)); kidnap of a federal agent (in violation of § 1201(a)(5)); and felony murder of a federal agent (in violation of §§ 1111(a), 1114). App. 12–32.

[2] Apparently, DEA officials had attempted to gain respondent's presence in the United States through informal negotiations with Mexican officials, but were unsuccessful. DEA officials then, through a contact in Mexico, offered to pay a reward and expenses in return for the delivery of respondent to the United States. *United States* v. *Caro-Quintero*, 745 F. Supp., at 602–604.

Respondent moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico. Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, T. I. A. S. No. 9656 (Extradition Treaty or Treaty). The District Court rejected the outrageous governmental conduct claim, but held that it lacked jurisdiction to try respondent because his abduction violated the Extradition Treaty. The District Court discharged respondent and ordered that he be repatriated to Mexico. 745 F. Supp., at 614.

The Court of Appeals affirmed the dismissal of the indictment and the repatriation of respondent, relying on its decision in *United States* v. *Verdugo-Urquidez*, 939 F. 2d 1341 (CA9 1991), cert. pending, No. 91–670. 946 F. 2d 1466 (1991). In *Verdugo*, the Court of Appeals held that the forcible abduction of a Mexican national with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico.[3] Although the Treaty does not expressly prohibit such abductions, the Court of Appeals held that the "purpose" of the Treaty was violated by a forcible abduction, 939 F. 2d, at 1350, which, along with a formal protest by the offended nation, would give a defendant the right to invoke the Treaty violation to defeat jurisdiction of the District Court to try him.[4] The Court of Appeals further held that the proper remedy for

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[3] Rene Martin Verdugo-Urquidez was also indicted for the murder of Agent Camarena. In an earlier decision, we held that the Fourth Amendment did not apply to a search by United States agents of Verdugo-Urquidez' home in Mexico. *United States* v. *Verdugo-Urquidez*, 494 U. S. 259 (1990).

[4] The Court of Appeals remanded for an evidentiary hearing as to whether Verdugo's abduction had been authorized by authorities in the United States. *United States* v. *Verdugo-Urquidez*, 939 F. 2d, at 1362.

such a violation would be dismissal of the indictment and repatriation of the defendant to Mexico.

In the instant case, the Court of Appeals affirmed the District Court's finding that the United States had authorized the abduction of respondent, and that letters from the Mexican Government to the United States Government served as an official protest of the Treaty violation. Therefore, the Court of Appeals ordered that the indictment against respondent be dismissed and that respondent be repatriated to Mexico. 946 F. 2d, at 1467. We granted certiorari, 502 U. S. 1024 (1992), and now reverse.

Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty and proceedings against a defendant brought before a court by means of a forcible abduction. We addressed the former issue in *United States* v. *Rauscher*, 119 U. S. 407 (1886); more precisely, the issue whether the Webster-Ashburton Treaty of 1842, 8 Stat. 576, which governed extraditions between England and the United States, prohibited the prosecution of defendant Rauscher for a crime other than the crime for which he had been extradited. Whether this prohibition, known as the doctrine of specialty, was an intended part of the treaty had been disputed between the two nations for some time. *Rauscher*, 119 U. S., at 411. Justice Miller delivered the opinion of the Court, which carefully examined the terms and history of the treaty; the practice of nations in regards to extradition treaties; the case law from the States; and the writings of commentators, and reached the following conclusion:

> "[A] person who has been brought within the jurisdiction of the court *by virtue of proceedings under an extradition treaty*, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him,

> after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." *Id.*, at 430 (emphasis added).

In addition, Justice Miller's opinion noted that any doubt as to this interpretation was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party. *Id.*, at 423.[5] Unlike the case before us today, the defendant in *Rauscher* had been brought to the United States by way of an extradition treaty; there was no issue of a forcible abduction.

In *Ker* v. *Illinois*, 119 U. S. 436 (1886), also written by Justice Miller and decided the same day as *Rauscher*, we addressed the issue of a defendant brought before the court by way of a forcible abduction. Frederick Ker had been tried and convicted in an Illinois court for larceny; his presence before the court was procured by means of forcible abduction from Peru. A messenger was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The messenger, however, disdained reliance on the treaty processes, and instead forcibly kidnaped Ker and brought him to the United States.[6] We distinguished Ker's case from *Rauscher*, on the basis that Ker was not brought into the United States by virtue of the extradition treaty between the United States and Peru, and rejected Ker's argument that he had a right

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[5] Justice Gray, concurring, would have rested the decision on the basis of these Acts of Congress alone. *Rauscher*, 119 U. S., at 433. Chief Justice Waite dissented, concluding that the treaty did not forbid trial on a charge other than that on which extradition was granted, and that the Acts of Congress did not change the "effect of the treaty." *Id.*, at 436.

[6] Although the opinion does not explain why the messenger failed to present the warrant to the proper authorities, commentators have suggested that the seizure of Ker in the aftermath of a revolution in Peru provided the messenger with no "proper authorities" to whom the warrant could be presented. See Kester, Some Myths of United States Extradition Law, 76 Geo. L. J. 1441, 1451 (1988).

under the extradition treaty to be returned to this country only in accordance with its terms.[7] We rejected Ker's due process argument more broadly, holding in line with "the highest authorities" that "such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." *Ker, supra,* at 444.

In *Frisbie* v. *Collins,* 342 U. S. 519, rehearing denied, 343 U. S. 937 (1952), we applied the rule in *Ker* to a case in which the defendant had been kidnaped in Chicago by Michigan officers and brought to trial in Michigan. We upheld the conviction over objections based on the Due Process Clause and the federal Kidnaping Act and stated:

> "This Court has never departed from the rule announced in *[Ker]* that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They

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[7] In the words of Justice Miller, the "treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." *Ker* v. *Illinois,* 119 U. S., at 443.

Two cases decided during the Prohibition Era in this country have dealt with seizures claimed to have been in violation of a treaty entered into between the United States and Great Britain to assist the United States in offshore enforcement of its prohibition laws, and to allow British passenger ships to carry liquor while in the waters of the United States. 43 Stat. 1761 (1924). The history of the negotiations leading to the treaty is set forth in *Cook* v. *United States,* 288 U. S. 102, 111–118 (1933). In that case we held that the treaty provision for seizure of British vessels operating beyond the 3-mile limit was intended to be exclusive, and that therefore liquor seized from a British vessel in violation of the treaty could not form the basis of a conviction.

In *Ford* v. *United States,* 273 U. S. 593 (1927), the argument as to personal jurisdiction was deemed to have been waived.

> rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Frisbie, supra,* at 522 (citation and footnote omitted).[8]

The only differences between *Ker* and the present case are that *Ker* was decided on the premise that there was no governmental involvement in the abduction, 119 U. S., at 443; and Peru, from which Ker was abducted, did not object to his prosecution.[9] Respondent finds these differences to be dispositive, as did the Court of Appeals in *Verdugo,* 939 F. 2d, at 1346, contending that they show that respondent's prosecution, like the prosecution of Rauscher, violates the implied terms of a valid extradition treaty. The Government, on the other hand, argues that *Rauscher* stands as an "exception" to the rule in *Ker* only when an extradition treaty is invoked, and the terms of the treaty provide that its breach will limit the jurisdiction of a court. Brief for United States 17. Therefore, our first inquiry must be whether the abduction of respondent from Mexico violated the Extradition Treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it.

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[8] We have applied *Ker* to numerous cases where the presence of the defendant was obtained by an interstate abduction. See, *e. g., Mahon* v. *Justice,* 127 U. S. 700 (1888); *Cook* v. *Hart,* 146 U. S. 183 (1892); *Pettibone* v. *Nichols,* 203 U. S. 192, 215–216 (1906).

[9] Ker also was not a national of Peru, whereas respondent is a national of the country from which he was abducted. Respondent finds this difference to be immaterial. Tr. of Oral Arg. 26.

In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning. *Air France* v. *Saks*, 470 U. S. 392, 397 (1985); *Valentine* v. *United States ex rel. Neidecker*, 299 U. S. 5, 11 (1936). The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs. Respondent submits that Article 22(1) of the Treaty, which states that it "shall apply to offenses specified in Article 2 [including murder] committed before and after this Treaty enters into force," 31 U. S. T., at 5073–5074, evidences an intent to make application of the Treaty mandatory for those offenses. However, the more natural conclusion is that Article 22 was included to ensure that the Treaty was applied to extraditions requested after the Treaty went into force, regardless of when the crime of extradition occurred.[10]

More critical to respondent's argument is Article 9 of the Treaty, which provides:

> "1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
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> "2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." *Id.*, at 5065.

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[10] This interpretation is supported by the second clause of Article 22, which provides that "[r]equests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899, ..." Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, 5074, T. I. A. S. No. 9656.

According to respondent, Article 9 embodies the terms of the bargain which the United States struck: If the United States wishes to prosecute a Mexican national, it may request that individual's extradition. Upon a request from the United States, Mexico may either extradite the individual or submit the case to the proper authorities for prosecution in Mexico. In this way, respondent reasons, each nation preserved its right to choose whether its nationals would be tried in its own courts or by the courts of the other nation. This preservation of rights would be frustrated if either nation were free to abduct nationals of the other nation for the purposes of prosecution. More broadly, respondent reasons, as did the Court of Appeals, that all the processes and restrictions on the obligation to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnaping to gain the presence of an individual for prosecution in a manner not contemplated by the Treaty. *Verdugo, supra,* at 1350.

We do not read the Treaty in such a fashion. Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution. In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution. *Rauscher,* 119 U. S., at 411–412; *Factor* v. *Laubenheimer,* 290 U. S. 276, 287 (1933); cf. *Valentine* v. *United States ex rel. Neidecker, supra,* at 8–9 (United States may not extradite a citizen in the absence of a statute or treaty obligation). Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures. See 1 J. Moore, A Treatise on Extradition and Interstate Rendition § 72 (1891). The Treaty thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the

other country, and establishing the procedures to be followed when the Treaty is invoked.

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican Government was made aware, as early as 1906, of the *Ker* doctrine, and the United States' position that it applied to forcible abductions made outside of the terms of the United States-Mexico Extradition Treaty.[11] Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of *Ker*.[12] Moreover, although language which would grant individuals exactly the right sought by respondent had been considered and drafted as

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[11] In correspondence between the United States and Mexico growing out of the 1905 Martinez incident, in which a Mexican national was abducted from Mexico and brought to the United States for trial, the Mexican Chargé wrote to the Secretary of State protesting that as Martinez' arrest was made outside of the procedures established in the extradition treaty, "the action pending against the man can not rest [on] any legal foundation." Letter of Balbino Davalos to Secretary of State, reprinted in Papers Relating to the Foreign Relations of the United States, H. R. Doc. No. 1, 59th Cong., 2d Sess., pt. 2, p. 1121 (1906). The Secretary of State responded that the exact issue raised by the Martinez incident had been decided by *Ker*, and that the remedy open to the Mexican Government, namely, a request to the United States for extradition of Martinez' abductor, had been granted by the United States. Letter of Robert Bacon to Mexican Chargé, reprinted in Papers Relating to the Foreign Relations of the United States, H. R. Doc. No. 1, *supra*, at 1121–1122.

Respondent and the Court of Appeals stress a statement made in 1881 by Secretary of State James Blaine to the Governor of Texas to the effect that the extradition treaty in its form at that time did not authorize unconsented to abductions from Mexico. *Verdugo*, 939 F. 2d, at 1354; Brief for Respondent 14. This misses the mark, however, for the Government's argument is not that the Treaty authorizes the abduction of respondent, but that the Treaty does not prohibit the abduction.

[12] The parties did expressly include the doctrine of specialty in Article 17 of the Treaty, notwithstanding the judicial recognition of it in *United States* v. *Rauscher*, 119 U. S. 407 (1886). 31 U. S. T., at 5071–5072.

early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current Treaty.[13]

Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty. See *Valentine*, 299 U. S., at 17 ("Strictly the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied").

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are "so clearly prohibited in international law" that there was no reason to include such a clause in the Treaty itself. Brief for Respondent 11. The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. *Id.*, at 17. Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms.

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[13] In Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, the Advisory Committee of the Research in International Law proposed:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, 29 Am. J. Int'l L. 442 (Supp. 1935).

The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that the affected foreign government had registered a protest. *Verdugo*, 939 F. 2d, at 1357 ("[I]n the kidnapping case there must be a formal protest from the offended government after the kidnapping"). Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the treaty. The formal protest, therefore, ensures that the "offended" nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution. Thus the Extradition Treaty only prohibits gaining the defendant's presence by means other than those set forth in the Treaty when the nation from which the defendant was abducted objects.

This argument seems to us inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation. In *Rauscher*, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

More fundamentally, the difficulty with the support respondent garners from international law is that none of it relates to the practice of nations in relation to extradition treaties. In *Rauscher*, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, respond-

ent would imply terms in the Extradition Treaty from the practice of nations with regards to international law more generally.[14] Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not "exercise its police power in the territory of another state." Brief for Respondent 16. There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended that an invasion of the United States by Mexico would violate the terms of the Extradition Treaty between the two nations.[15]

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual

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[14] Similarly, the Court of Appeals in *Verdugo* reasoned that international abductions violate the "purpose" of the Treaty, stating that "[t]he requirements extradition treaties impose constitute a means of safeguarding the sovereignty of the signatory nations, as well as ensuring the fair treatment of individuals." 939 F. 2d, at 1350. The ambitious purpose ascribed to the Treaty by the Court of Appeals, we believe, places a greater burden on its language and history than they can logically bear. In a broad sense, most international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations. This, however, does not mean that the violation of any principle of international law constitutes a violation of this particular treaty.

[15] In the same category are the examples cited by respondent in which, after a forcible international abduction, the offended nation protested the abduction and the abducting nation then returned the individual to the protesting nation. Brief for Respondent 18, citing, *inter alia*, 1 Bassiouni, International Extradition: United States Law and Practice § 5.4, pp. 235–237 (2d rev. ed. 1987). These may show the practice of nations under customary international law, but they are of little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted. More to the point for our purposes are cases such as *The Richmond*, 9 Cranch 102 (1815), and *The Merino*, 9 Wheat. 391 (1824), both of which hold that a seizure of a vessel in violation of international law does not affect the jurisdiction of a United States court to adjudicate rights in connection with the vessel. These cases are discussed, and distinguished, in *Cook* v. *United States*, 288 U. S., at 122.

outside of its terms goes beyond established precedent and practice. In *Rauscher*, the implication of a doctrine of specialty into the terms of the Webster-Ashburton Treaty, which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.

Respondent and his *amici* may be correct that respondent's abduction was "shocking," Tr. of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, App. 33–38, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.[16] We

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[16] The Mexican Government has also requested from the United States the extradition of two individuals it suspects of having abducted respondent in Mexico, on charges of kidnaping. App. 39–66.

The advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation, is illustrated by the history of the negotiations leading to the treaty discussed in *Cook* v. *United States*, *supra*. The United States was interested in being able to search British vessels that hovered beyond the 3-mile limit and served as supply ships for motor launches, which took intoxicating liquor from them into ports for further distribution in violation of prohibition laws. The United States initially proposed that both nations agree to searches of the other's vessels beyond the 3-mile limit; Great Britain rejected such an approach, since it had no prohibition laws and therefore no problem with United States vessels hovering just beyond its territorial waters. The parties appeared to be at loggerheads; then this Court decided *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100 (1923), holding that our prohibition laws applied to foreign merchant ves-

conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker* v. *Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

The Court correctly observes that this case raises a question of first impression. See *ante*, at 659. The case is unique for several reasons. It does not involve an ordinary abduction by a private kidnaper, or bounty hunter, as in *Ker* v. *Illinois*, 119 U. S. 436 (1886); nor does it involve the apprehension of an American fugitive who committed a crime in one State and sought asylum in another, as in *Frisbie* v. *Collins*, 342 U. S. 519 (1952). Rather, it involves this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty.

A Mexican citizen was kidnaped in Mexico and charged with a crime committed in Mexico; his offense allegedly violated both Mexican and American law. Mexico has formally

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sels as well as domestic within the territorial waters of the United States, and that therefore the carrying of intoxicating liquors by foreign passenger ships violated those laws. A treaty was then successfully negotiated, giving the United States the right to seizure beyond the 3-mile limit (which it desired), and giving British passenger ships the right to bring liquor into United States waters so long as the liquor supply was sealed while in those waters (which Great Britain desired). *Cook* v. *United States*, *supra*.

demanded on at least two separate occasions[1] that he be returned to Mexico and has represented that he will be prosecuted and, if convicted, punished for his offense.[2] It is clear that Mexico's demand must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico. In my opinion, a fair reading of the treaty in light of our decision in *United States* v. *Rauscher*, 119 U. S. 407 (1886), and applicable principles of international law, leads inexorably to the conclusion that the District Court, *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (CD Cal. 1990), and the Court of Appeals for the Ninth Circuit, 946 F. 2d 1466 (1991) *(per curiam)*, correctly construed that instrument.

I

The extradition treaty with Mexico[3] is a comprehensive document containing 23 articles and an appendix listing the

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[1] The abduction of respondent occurred on April 2, 1990. *United States* v. *Caro-Quintero*, 745 F. Supp. 599, 603 (CD Cal. 1990). Mexico responded quickly and unequivocally. Tr. of Oral Arg. 33; Brief for Respondent 3. On April 18, 1990, Mexico requested an official report on the role of the United States in the abduction, and on May 16, 1990, and July 19, 1990, it sent diplomatic notes of protest from the Embassy of Mexico to the United States Department of State. See Brief for United Mexican States as *Amicus Curiae* (Mexican *Amicus*) 5–6; App. to Mexican *Amicus* 1a–24a. In the May 16th note, Mexico said that it believed that the abduction was "carried out with the knowledge of persons working for the U. S. government, in violation of the procedure established in the extradition treaty in force between the two countries," *id.*, at 5a, and in the July 19th note, it requested the provisional arrest and extradition of the law enforcement agents allegedly involved in the abduction. *Id.*, at 9a–15a.

[2] Mexico has already tried a number of members involved in the conspiracy that resulted in the murder of the Drug Enforcement Administration agent. For example, Rafael Caro-Quintero, a co-conspirator of Alvarez-Machain in this case, has already been imprisoned in Mexico on a 40-year sentence. See Brief for Lawyers Committee for Human Rights as *Amicus Curiae* 4.

[3] Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, T. I. A. S. No. 9656 (Treaty or Extradition Treaty).

extraditable offenses covered by the agreement. The parties announced their purpose in the preamble: The two governments desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."[4] From the preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party,[5] the delineation of the procedures and evidentiary requirements for extradition,[6] the spe-

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[4] *Id.*, at 5061. In construing a treaty, the Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U. S. 392, 399 (1985). It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance—the stated goals of the Treaty. See also Presidential Letter of Transmittal attached to Senate Advice and Consent 3 (Treaty would "make a significant contribution to international cooperation in law enforcement").

Extradition treaties prevent international conflict by providing agreed-upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty. According to one writer, before extradition treaties became common, European states often granted asylum to fugitives from other states, with the result that "a sovereign could enforce the return of fugitives only by force of arms .... Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I." M. Bassiouni, International Extradition and World Public Order 6 (1974). This same writer explained that such treaties further the purpose of international law, which is "designed to protect the sovereignty and territorial integrity of states, and [to] restrict impermissible state conduct." 1 M. Bassiouni, International Extradition: United States Law and Practice, ch. 5, § 2, p. 194 (2d rev. ed. 1987).

The object of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual delivery of fugitives, but why they do prohibit state-sponsored abductions. See Restatement (Third) of Foreign Relations (Restatement) § 432, and Comments *a*–*c* (1987).

[5] Treaty, 31 U. S. T., at 5062, 5063 (Articles 2 and 4).

[6] *Id.*, at 5063, 5064–5065, 5066–5068, 5069 (Articles 3, 7, 10, 12, and 13).

cial provisions for political offenses and capital punishment,[7] and other details, the Treaty appears to have been designed to cover the entire subject of extradition. Thus, Article 22, entitled "Scope of Application," states that the "Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force," and Article 2 directs that "[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of [the extraditable offenses listed in] the clauses of the Appendix."[8] Moreover, as noted by the Court, *ante*, at 663, Article 9 expressly provides that neither contracting party is bound to deliver up its own nationals, although it may do so in its discretion, but if it does not do so, it "shall submit the case to its competent authorities for purposes of prosecution."[9]

The Government's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more than verbiage. For example, provisions requiring "sufficient" evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested country discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8), would serve little purpose if the requesting country could simply kidnap the person. As the Court of Appeals for the Ninth Circuit recognized in a related case, "[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." *United States* v. *Verdugo-Urquidez*, 939 F. 2d 1341, 1349 (1991). In addition, all of these provisions "only make sense if they are understood as *requiring* each treaty signatory to

[7] *Id.*, at 5063–5064, 5065 (Articles 5 and 8).
[8] *Id.*, at 5073–5074, 5062.
[9] *Id.*, at 5065.

comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." *Id.*, at 1351.

It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other nation. See *ante*, at 664, 665–666. Relying on that omission,[10] the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self-help whenever they deem force more expeditious than legal process.[11] If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty.[12]

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[10] The Court resorts to the same method of analysis as did the dissent in *United States* v. *Rauscher*, 119 U. S. 407 (1886). Chief Justice Waite would only recognize an explicit provision, and in the absence of one, he concluded that the treaty did not require that a person be tried only for the offense for which he had been extradited: "The treaty requires a delivery up to justice, on demand, of those accused of certain crimes, but says nothing about what shall be done with them after the delivery has been made. It might have provided that they should not be tried for any other offences than those for which they were surrendered, but it has not." *Id.*, at 434. That approach was rejected by the Court in *Rauscher* and should also be rejected by the Court here.

[11] To make the point more starkly, the Court has, in effect, written into Article 9 a new provision, which says: "Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other."

[12] It is ironic that the United States has attempted to justify its unilateral action based on the kidnaping, torture, and murder of a federal agent by authorizing the kidnaping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico. See App. to Mexican *Amicus* 5a. This goes to my earlier point, see n. 4, *supra*, that extradition treaties promote harmonious relations by providing for the orderly surrender of a person by one state to another, and without such treaties, resort to force often followed.

That, however, is a highly improbable interpretation of a consensual agreement,[13] which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.[14] In my opinion, "the manifest scope and object of the treaty itself," *Rauscher*, 119 U. S., at 422, plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party. That opinion is confirmed by a consideration of the "legal context" in which the Treaty was negotiated.[15] *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979).

II

In *Rauscher*, the Court construed an extradition treaty that was far less comprehensive than the 1978 Treaty with Mexico. The 1842 treaty with Great Britain determined the boundary between the United States and Canada, provided for the suppression of the African slave trade, and also con-

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[13] This Court has previously described a treaty as generally "in its nature a contract between two nations," *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829); see *Rauscher*, 119 U. S., at 418; it is also in this country the law of the land. 2 Pet., at 314; 119 U. S., at 418–419.

[14] Mexico's understanding is that "[t]he extradition treaty governs comprehensively the delivery of all persons for trial in the requesting state 'for an offense committed outside the territory of the requesting Party.'" Brief for United Mexican States as *Amicus Curiae*, O. T. 1991, No. 91–670, p. 6. And Canada, with whom the United States also shares a large border and with whom the United States also has an extradition treaty, understands the treaty to be "the exclusive means for a requesting government to obtain . . . a removal" of a person from its territory, unless a nation otherwise gives its consent. Brief for Government of Canada as *Amicus Curiae* 4.

[15] The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that a different understanding with Mexico was reached. See Bassiouni, International Extradition: United States Law and Practice, ch. 2, § 4.3, at 82 ("Negotiations, preparatory works, and diplomatic correspondence are an integral part of th[e] surrounding circumstances, and [are] often relied on by courts in ascertaining the intentions of the parties") (footnote omitted).

tained one paragraph authorizing the extradition of fugitives "in certain cases." 8 Stat. 576. In Article X, each nation agreed to "deliver up to justice all persons" properly charged with any one of seven specific crimes, including murder. 119 U. S., at 421.[16] After Rauscher had been extradited for murder, he was charged with the lesser offense of inflicting cruel and unusual punishment on a member of the crew of a vessel on the high seas. Although the treaty did not purport to place any limit on the jurisdiction of the demanding state after acquiring custody of the fugitive, this Court held that he could not be tried for any offense other than murder.[17] Thus, the treaty constituted the exclusive means by which

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[16] Article X of the Treaty provided:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." 8 Stat. 576.

[17] The doctrine defined by the Court in *Rauscher*—that a person can be tried only for the crime for which he had been extradited—has come to be known as the "doctrine of specialty."

the United States could obtain jurisdiction over a defendant within the territorial jurisdiction of Great Britain.

The Court noted that the treaty included several specific provisions, such as the crimes for which one could be extradited, the process by which the extradition was to be carried out, and even the evidence that was to be produced, and concluded that "the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offence and for no other." *Id.*, at 423. The Court reasoned that it did not make sense for the treaty to provide such specifics only to have the person "pas[s] into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place." *Id.*, at 421. To interpret the treaty in a contrary way would mean that a country could request extradition of a person for one of the seven crimes covered by the treaty, and then try the person for another crime, such as a political crime, which was clearly not covered by the treaty; this result, the Court concluded, was clearly contrary to the intent of the parties and the purpose of the treaty.

Rejecting an argument that the sole purpose of Article X was to provide a procedure for the transfer of an individual from the jurisdiction of one sovereign to another, the Court stated:

> "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.
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> "The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretence of establishing a charge provided for by the extra-

> dition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offences than that for which he was extradited, is met by the manifest scope and object of the treaty itself." *Id.*, at 422.

Thus, the Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.[18]

Although the Court's conclusion in *Rauscher* was supported by a number of judicial precedents, the holdings in these cases were not nearly as uniform[19] as the consensus of international opinion that condemns one nation's violation of the territorial integrity of a friendly neighbor.[20] It is

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[18] In its opinion, the Court suggests that the result in *Rauscher* was dictated by the fact that two federal statutes had imposed the doctrine of specialty upon extradition treaties. *Ante*, at 660. The two cited statutes, however, do not contain any language purporting to limit the jurisdiction of the court; rather, they merely provide for protection of the accused pending trial.

[19] In fact, both parties noted in their respective briefs several authorities that had held that a person could be tried for an offense other than the one for which he had been extradited. See Brief for United States in *United States* v. *Rauscher*, O. T. 1885, No. 1249, pp. 6–10 (citing *United States* v. *Caldwell*, 8 Blatchford 131 (SDNY 1871); *United States* v. *Lawrence*, 13 Blatchford 295 (SDNY 1876); *Adriance* v. *Lagrave*, 59 N. Y. 110 (1874)); Brief for Respondent in *United States* v. *Rauscher*, O. T. 1885, No. 1249, pp. 8–16.

[20] This principle is embodied in Article 17 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U. S. T. 2394, T. I. A. S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U. S. T. 607, T. I. A. S. No. 6847, as well as numerous provisions of the United Nations Charter, June 26, 1945, 59 Stat. 1031, T. S. No. 993 (to which both the

shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.[21] Justice Story found it shocking enough that the United States would attempt to justify an American seizure of a foreign vessel in a Spanish port:

> "But, even supposing, for a moment, that our laws had required an entry of The Apollon, in her transit, does it follow that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. *It would be monstrous* to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 9 Wheat. 362, 370–371 (1824) (emphasis added).[22]

United States and Mexico are signatories). See generally Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity 407 (Y. Dinstein & M. Tabory eds. 1989).

[21] When Abraham Sofaer, Legal Adviser of the State Department, was questioned at a congressional hearing, he resisted the notion that such seizures were acceptable: "'Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ? [H]ow would we feel if some foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, . . . because we refused through the normal channels of international, legal communications, to extradite that individual?'" Bill To Authorize Prosecution of Terrorists and Others Who Attack U. S. Government Employees and Citizens Abroad: Hearing before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 63 (1985).

[22] Justice Story's opinion continued:

"The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue

The law of nations, as understood by Justice Story in 1824, has not changed. Thus, a leading treatise explains:

> "A State must not perform acts of sovereignty in the territory of another State.
>
> . . . . .
>
> "It is . . . a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended." 1 Oppenheim's International Law 295, and n. 1 (H. Lauterpacht 8th ed. 1955).[23]

Commenting on the precise issue raised by this case, the chief reporter for the American Law Institute's Restatement of Foreign Relations used language reminiscent of Justice Story's characterization of an official seizure in a foreign jurisdiction as "monstrous":

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jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the range of a common shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American." *The Apollon*, 9 Wheat., at 371–372.

[23] See Restatement § 432, Comment *c* ("If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned").

> "When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states)."[24]

In the *Rauscher* case, the legal background that supported the decision to imply a covenant not to prosecute for an offense different from that for which extradition had been granted was far less clear than the rule against invading the territorial integrity of a treaty partner that supports Mexico's position in this case.[25] If *Rauscher* was correctly decided—and I am convinced that it was—its rationale clearly dictates a comparable result in this case.[26]

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[24] Henkin, A Decent Respect to the Opinions of Mankind, 25 John Marshall L. Rev. 215, 231 (1992) (footnote omitted).

[25] Thus, the Restatement states in part:

"(2) A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.

. . . . . .

"*c. Consequences of violation of territorial limits of law enforcement.* If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws." § 432, and Comment *c*.

[26] Just as Rauscher had standing to raise the treaty violation issue, respondent may raise a comparable issue in this case. Certainly, if an individual who is not a party to an agreement between the United States and another country is permitted to assert the rights of that country in our courts, as is true in the specialty cases, then the same rule must apply to

III

A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law,[27] and in my opinion, also constitutes a breach of our treaty obligations. Thus, at the outset of its opinion, the Court states the issue as "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Ante*, at 657. That, of course, is the question decided in *Ker* v. *Illinois*, 119 U. S. 436 (1886); it is not, however, the question presented for decision today.

The importance of the distinction between a court's exercise of jurisdiction over either a person or property that has been wrongfully seized by a private citizen, or even by a state law enforcement agent, on the one hand, and the attempted exercise of jurisdiction predicated on a seizure by federal officers acting beyond the authority conferred by treaty, on the other hand, is explained by Justice Brandeis in his opinion for the Court in *Cook* v. *United States*, 288 U. S. 102 (1933). That case involved a construction of a Prohibition Era treaty with Great Britain that authorized American agents to board certain British vessels to ascertain whether they were engaged in importing alcoholic beverages. A

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the individual who has been a victim of this country's breach of an extradition treaty and who wishes to assert the rights of that country in our courts after that country has already registered its protest.

[27] "In the international legal order, treaties are concluded by states against a background of customary international law. Norms of customary international law specify the circumstances in which the failure of one party to fulfill its treaty obligations will permit the other to rescind the treaty, retaliate, or take other steps." Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 1082, 1157 (1992).

British vessel was boarded 11½ miles off the coast of Massachusetts, found to be carrying unmanifested alcoholic beverages, and taken into port. The Collector of Customs assessed a penalty which he attempted to collect by means of libels against both the cargo and the seized vessel.

The Court held that the seizure was not authorized by the treaty because it occurred more than 10 miles off shore.[28] The Government argued that the illegality of the seizure was immaterial because, as in *Ker*, the court's jurisdiction was supported by possession even if the seizure was wrongful. Justice Brandeis acknowledged that the argument would succeed if the seizure had been made by a private party without authority to act for the Government, but that a different rule prevails when the Government itself lacks the power to seize. Relying on *Rauscher*, and distinguishing *Ker*, he explained:

> "*Fourth.* As the Mazel Tov was seized without warrant of law, the libels were properly dismissed. The Government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.
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> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial.

[28] The treaty provided that the boarding rights could not be exercised at a greater distance from the coast than the vessel could traverse in one hour, and the seized vessel's speed did not exceed 10 miles an hour. *Cook* v. *United States*, 288 U. S., at 107, 110.

> *Dodge* v. *United States*, 272 U. S. 530, 532 [(1926)]. Compare *Ker* v. *Illinois*, 119 U. S. 436, 444. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310 [(1818)]; *Taylor* v. *United States*, 3 How. 197, 205–206 [(1845)]. The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare *United States* v. *Rauscher*, 119 U. S. 407." *Cook* v. *United States*, 288 U. S., at 120–122.

The same reasoning was employed by Justice Miller to explain why the holding in *Rauscher* did not apply to the *Ker* case. The arresting officer in *Ker* did not pretend to be acting in any official capacity when he kidnaped Ker. As Justice Miller noted, "the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty *or from the government*

of the United States." *Ker* v. *Illinois*, 119 U. S., at 443 (emphasis added).[29] The exact opposite is true in this case, as it was in *Cook*.[30]

The Court's failure to differentiate between private abductions and official invasions of another sovereign's territory also accounts for its misplaced reliance on the 1935 proposal made by the Advisory Committee on Research in International Law. See *ante*, at 665–666, and n. 13. As the text of that proposal plainly states, it would have rejected the rule of the *Ker* case.[31] The failure to adopt that recommendation does not speak to the issue the Court decides today. The

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[29] As the Illinois Supreme Court described the action:

"The arrest and detention of [Ker] was not by any authority of the general government, and no obligation is implied on the part of the Federal or any State government . . . . The invasion of the sovereignty of Peru, if any wrong was done, was by individuals, perhaps some of them owing no allegiance to the United States, and not by the Federal government." *Ker* v. *Illinois*, 110 Ill. 627, 643 (1884).

[30] The Martinez incident discussed by the Court, see *ante*, at 665, n. 11, also involved an abduction by a private party; the reference to the *Ker* precedent was therefore appropriate in that case. On the other hand, the letter written by Secretary of State Blaine to the Governor of Texas in 1881 unequivocally disapproved of abductions by either party to an extradition treaty. In 1984, Secretary of State Schultz expressed the same opinion about an authorized kidnaping of a Canadian national. He remarked that, in view of the extradition treaty between the United States and Canada, it was understandable that Canada was "outraged" by the kidnaping and considered it to be "a violation of the treaty and of international law, as well as an affront to its sovereignty." See Leich, Contemporary Practice of the United States Relating to International Law, 78 Am. J. Int'l L. 200, 208 (1984).

[31] Article 16 of the draft provides:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. 435, 623 (Supp. 1935).

Court's admittedly "shocking" disdain for customary and conventional international law principles, see *ante*, at 669, is thus entirely unsupported by case law and commentary.

IV

As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts.[32] Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold.[33] That the Executive may wish to reinterpret[34] the Treaty to

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[32] See, *e. g.*, Storm Arises Over Camarena; U. S. Wants Harder Line Adopted, Latin Am. Weekly Rep., Mar. 8, 1985, p. 10; U. S. Presses Mexico To Find Agent, Chicago Tribune, Feb. 20, 1985, p. 10.

[33] As Justice Brandeis so wisely urged:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).

[34] Certainly, the Executive's view has changed over time. At one point, the Office of Legal Counsel advised the administration that such seizures were contrary to international law because they compromised the territorial integrity of the other nation and were only to be undertaken with the consent of that nation. 4B Op. Off. Legal Counsel 549, 556 (1980). More recently, that opinion was revised, and the new opinion concluded that the President did have the authority to override customary international law. Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess., 4–5 (1989) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, U. S. Department of Justice).

allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation.[35] Indeed, the desire for revenge exerts "a kind of hydraulic pressure . . . before which even well settled principles of law will bend," *Northern Securities Co.* v. *United States*, 193 U. S. 197, 401 (1904) (Holmes, J., dissenting), but it is precisely at such moments that we should remember and be guided by our duty "to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it." *United States* v. *Mine Workers*, 330 U. S. 258, 342 (1947) (Rutledge, J., dissenting). The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.

The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Court's cases—including our decision in *Ker*—that court held that the prosecution of a defendant kidnaped by agents of South Africa in another country must be dismissed. *S* v. *Ebrahim*, S. Afr. L. Rep. (Apr.–June 1991).[36] The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a deci-

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[35] Cf. *Perkins* v. *Elg*, 307 U. S. 325 (1939) (construing treaty in accordance with historical construction and refusing to defer to change in Executive policy); *Johnson* v. *Browne*, 205 U. S. 309 (1907) (rejecting Executive's interpretation).

[36] The South African court agreed with appellant that an "abduction represents a violation of the applicable rules of international law, that these rules are part of [South African] law, and that this violation of the law deprives the Court . . . of its competence to hear [appellant's] case . . . ." S. Afr. L. Rep., at 8–9.

sion of this character.[37] As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws."[38] To counter that tendency, he reminds us:

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[39]

I respectfully dissent.

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[37] As Judge Mansfield presciently observed in a case not unlike the one before us today: "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *United States* v. *Toscanino*, 500 F. 2d 267, 274 (CA2 1974).

[38] 2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945).

[39] *Ibid.*

Syllabus

ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF L. R., ET AL. *v.* RICHARDS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91–367. Argued March 31, 1992—Decided June 15, 1992

Petitioner brought this suit on behalf of her daughters in the District Court, alleging federal jurisdiction based on the diversity-of-citizenship provision of 28 U. S. C. § 1332, and seeking monetary damages for alleged torts committed against the girls by their father and his female companion, the respondents here. The court granted respondents' motion to dismiss without prejudice, ruling in the alternative that it lacked jurisdiction because the case fell within the "domestic relations" exception to diversity jurisdiction and that its decision to dismiss was justified under the abstention principles announced in *Younger* v. *Harris*, 401 U. S. 37. The Court of Appeals affirmed.

Held:

1. A domestic relations exception to federal diversity jurisdiction exists as a matter of statutory construction. Pp. 693–701.

(a) The exception stems from *Barber* v. *Barber*, 21 How. 582, 584, in which the Court announced in dicta, without citation of authority or discussion of foundation, that federal courts have no jurisdiction over suits for divorce or the allowance of alimony. The lower federal courts have ever since recognized a limitation on their jurisdiction based on that statement, and this Court is unwilling to cast aside an understood rule that has existed for nearly a century and a half. Pp. 693–695.

(b) An examination of Article III, § 2, of the Constitution and of *Barber* and its progeny makes clear that the Constitution does not mandate the exclusion of domestic relations cases from federal-court jurisdiction. Rather, the origins of the exception lie in the statutory requirements for diversity jurisdiction. *De la Rama* v. *De la Rama*, 201 U. S. 303, 307. Pp. 695–697.

(c) That the domestic relations exception exists is demonstrated by the inclusion of the defining phrase, "all suits of a civil nature at common law or in equity," in the pre-1948 versions of the diversity statute, by *Barber*'s implicit interpretation of that phrase to exclude divorce and alimony actions, and by Congress' silent acceptance of this construction for nearly a century. Considerations of *stare decisis* have particular strength in this context, where the legislative power is implicated, and Congress remains free to alter what this Court has done. *Patterson* v.

Syllabus

McLean Credit Union, 491 U. S. 164, 172–173. Furthermore, it may be presumed that Congress amended the diversity statute in 1948 to replace the law/equity distinction with § 1332's "all civil actions" phrase with full cognizance of the Court's longstanding interpretation of the prior statutes, and that, absent any indication of an intent to the contrary, Congress adopted that interpretation in reenacting the statute. Pp. 697–701.

2. The domestic relations exception does not permit a district court to refuse to exercise diversity jurisdiction over a tort action for damages. The exception, as articulated by this Court since *Barber*, encompasses only cases involving the issuance of a divorce, alimony, or child custody decree. As so limited, the exception's validity must be reaffirmed, given the long passage of time without any expression of congressional dissatisfaction and sound policy considerations of judicial economy and expertise. Because this lawsuit in no way seeks a divorce, alimony, or child custody decree, the Court of Appeals erred by affirming the District Court's invocation of the domestic relations exception. Federal subject-matter jurisdiction pursuant to § 1332 is proper in this case. Pp. 701–704.

3. The District Court erred in abstaining from exercising jurisdiction under the *Younger* doctrine. Although this Court has extended *Younger* abstention to the civil context, it has never applied the notions of comity so critical to *Younger* where, as here, no proceeding was pending in state tribunals. Similarly, while it is not inconceivable that in certain circumstances the abstention principles developed in *Burford* v. *Sun Oil Co.*, 319 U. S. 315, might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody, such abstention is inappropriate here, where the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying torts alleged. Pp. 704–706.

934 F. 2d 1262, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 707. STEVENS, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 717.

Richard Ducote argued the cause and filed a brief for petitioner.

Paul Weidenfeld argued the cause for respondents. With him on the brief was *Samuel S. Dalton.**

JUSTICE WHITE delivered the opinion of the Court.

This case presents the issue whether the federal courts have jurisdiction or should abstain in a case involving alleged torts committed by the former husband of petitioner and his female companion against petitioner's children, when the sole basis for federal jurisdiction is the diversity-of-citizenship provision of 28 U. S. C. § 1332.

I

Petitioner Carol Ankenbrandt, a citizen of Missouri, brought this lawsuit on September 26, 1989, on behalf of her daughters L. R. and S. R. against respondents Jon A. Richards and Debra Kesler, citizens of Louisiana, in the United States District Court for the Eastern District of Louisiana. Alleging federal jurisdiction based on the diversity-of-citizenship provision of § 1332, Ankenbrandt's complaint sought monetary damages for alleged sexual and physical abuse of the children committed by Richards and Kesler. Richards is the divorced father of the children and Kesler his female companion.[1] On December 10, 1990, the District Court granted respondents' motion to dismiss this lawsuit.

**Marcia Robinson Lowry, Steven R. Shapiro,* and *John A. Powell* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

[1] Ankenbrandt represents that in the month prior to the filing of this federal-court action, on August 9, 1989, a juvenile court in Jefferson Parish, Louisiana, entered a judgment under the State's child protection laws, La. Rev. Stat. Ann. § 13:1600 *et seq.* (West 1983), repealed, 1991 La. Acts, No. 235, § 17, eff. Jan. 1, 1992, and superseded by Louisiana Children's Code, Title X, Art. 1001 *et seq.* (1991), permanently terminating all of Richards' parental rights because of the alleged abuse and permanently enjoining him from any contact with the children. Neither the District Court nor the Court of Appeals found it necessary to pass on the accuracy of this representation in resolving the issues presented; nor do we.

Citing *In re Burrus*, 136 U. S. 586, 593–594 (1890), for the proposition that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," the court concluded that this case fell within what has become known as the "domestic relations" exception to diversity jurisdiction, and that it lacked jurisdiction over the case. The court also invoked the abstention principles announced in *Younger* v. *Harris*, 401 U. S. 37 (1971), to justify its decision to dismiss the complaint without prejudice. No. 89–4244 (ED La., Dec. 10, 1990). The Court of Appeals affirmed in an unpublished opinion. No. 91–3037 (CA5, May 31, 1991), judgt. order reported at 934 F. 2d 1262.

We granted certiorari limited to the following questions: "(1) Is there a domestic relations exception to federal jurisdiction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?"[2] and "(3) Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine

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[2]The Courts of Appeals have generally diverged in cases involving application of the domestic relations exception to tort suits brought in federal court pursuant to diversity jurisdiction. See, *e. g.*, *Bennett* v. *Bennett*, 221 U. S. App. D. C. 90, 682 F. 2d 1039 (1982) (holding that the exception does not bar a claim for damages but that it does bar claims for injunctive relief); *Cole* v. *Cole*, 633 F. 2d 1083 (CA4 1980) (holding that the exception does not apply in tort suits stemming from custody and visitation disputes); *Drewes* v. *Ilnicki*, 863 F. 2d 469 (CA6 1988) (holding that the exception does not apply to a tort suit for intentional infliction of emotional distress); *Lloyd* v. *Loeffler*, 694 F. 2d 489 (CA7 1982) (holding that the exception does not apply to a tort claim for interference with the custody of a child); *McIntyre* v. *McIntyre*, 771 F. 2d 1316 (CA9 1985) (holding that the exception does not apply when the case does not involve questions of parental status, interference with pending state domestic relations proceedings, an alteration of a state-court judgment, or the impingement of the state court's supervision of a minor); *Ingram* v. *Hayes*, 866 F. 2d 368 (CA11 1988) (holding that the exception applies to divest a federal court of jurisdiction over a tort action for intentional infliction of emotional distress).

of *Younger* v. *Harris?*" 502 U. S. 1023 (1992). We address each of these issues in turn.

II

The domestic relations exception upon which the courts below relied to decline jurisdiction has been invoked often by the lower federal courts. The seeming authority for doing so originally stemmed from the announcement in *Barber* v. *Barber*, 21 How. 582 (1859), that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony. In that case, the Court heard a suit in equity brought by a wife (by her next friend) in Federal District Court pursuant to diversity jurisdiction against her former husband. She sought to enforce a decree from a New York state court, which had granted a divorce and awarded her alimony. The former husband thereupon moved to Wisconsin to place himself beyond the New York courts' jurisdiction so that the divorce decree there could not be enforced against him; he then sued for divorce in a Wisconsin court, representing to that court that his wife had abandoned him and failing to disclose the existence of the New York decree. In a suit brought by the former wife in Wisconsin Federal District Court, the former husband alleged that the court lacked jurisdiction. The court accepted jurisdiction and gave judgment for the divorced wife.

On appeal, it was argued that the District Court lacked jurisdiction on two grounds: first, that there was no diversity of citizenship because although divorced, the wife's citizenship necessarily remained that of her former husband; and second, that the whole subject of divorce and alimony, including a suit to enforce an alimony decree, was exclusively ecclesiastical at the time of the adoption of the Constitution and that the Constitution therefore placed the whole subject of divorce and alimony beyond the jurisdiction of the United States courts. Over the dissent of three Justices, the Court rejected both arguments. After an exhaustive survey of

the authorities, the Court concluded that a divorced wife could acquire a citizenship separate from that of her former husband and that a suit to enforce an alimony decree rested within the federal courts' equity jurisdiction. The Court reached these conclusions after summarily dismissing the former husband's contention that the case involved a subject matter outside the federal courts' jurisdiction. In so stating, however, the Court also announced the following limitation on federal jurisdiction:

> "Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.
>
> "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." *Barber, supra,* at 584.

As a general matter, the dissenters agreed with these statements, but took issue with the Court's holding that the instant action to enforce an alimony decree was within the equity jurisdiction of the federal courts.

The statements disclaiming jurisdiction over divorce and alimony decree suits, though technically dicta, formed the basis for excluding "domestic relations" cases from the jurisdiction of the lower federal courts, a jurisdictional limitation those courts have recognized ever since. The *Barber* Court, however, cited no authority and did not discuss the foundation for its announcement. Since that time, the Court has dealt only occasionally with the domestic relations limitation on federal-court jurisdiction, and it has never addressed the basis for such a limitation. Because we are unwilling to cast aside an understood rule that has been recognized for nearly

a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction.

A

Counsel argued in *Barber* that the Constitution prohibited federal courts from exercising jurisdiction over domestic relations cases. Brief for Appellant in *Barber* v. *Barber*, D. T. 1858, No. 44, pp. 4–5. An examination of Article III, *Barber* itself, and our cases since *Barber* makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts.

Article III, §2, of the Constitution provides in pertinent part:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

This section delineates the absolute limits on the federal courts' jurisdiction. But in articulating three different terms to define jurisdiction—"Cases, in Law and Equity," "Cases," and "Controversies"—this provision contains no limitation on subjects of a domestic relations nature. Nor did *Barber* purport to ground the domestic relations exception in these constitutional limits on federal jurisdiction. The Court's discussion of federal judicial power to hear suits

of a domestic relations nature contains no mention of the Constitution, see *Barber*, 21 How., at 584, and it is logical to presume that the Court based its statement limiting such power on narrower statutory, rather than broader constitutional, grounds. Cf. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988).

Subsequent decisions confirm that *Barber* was not relying on constitutional limits in justifying the exception. In one such case, for instance, the Court stated the "long established rule" that federal courts lack jurisdiction over certain domestic relations matters as having been based on the assumptions that "husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value." *De la Rama* v. *De la Rama*, 201 U. S. 303, 307 (1906). Since Article III contains no monetary limit on suits brought pursuant to federal diversity jurisdiction, *De la Rama*'s articulation of the "rule" in terms of the statutory requirements for diversity jurisdiction further supports the view that the exception is not grounded in the Constitution.

Moreover, even while citing with approval the *Barber* language purporting to limit the jurisdiction of the federal courts over domestic relations matters, the Court has heard appeals from territorial courts involving divorce, see, *e. g.*, *De la Rama*, *supra*; *Simms* v. *Simms*, 175 U. S. 162 (1899), and has upheld the exercise of original jurisdiction by federal courts in the District of Columbia to decide divorce actions, see, *e. g.*, *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 581, n. 54 (1962). Thus, even were the statements in *De la Rama* referring to the statutory prerequisites of diversity jurisdiction alone not persuasive testament to the statutory origins of the rule, by hearing appeals from legislative, or Article I, courts, this Court implicitly has made clear its understanding

that the source of the constraint on jurisdiction from *Barber* was *not* Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts. See *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582, 643 (1949) (Vinson, C. J., dissenting) ("We can no more review a legislative court's decision of a case which is not among those enumerated in Art. III than we can hear a case from a state court involving purely state law questions"). We therefore have no difficulty concluding that when the *Barber* Court "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce," 21 How., at 584, it was not basing its statement on the Constitution.[3]

B

That Article III, § 2, does not mandate the exclusion of domestic relations cases from federal-court jurisdiction, however, does not mean that such courts necessarily must retain and exercise jurisdiction over such cases. Other constitutional provisions explain why this is so. Article I, § 8, cl. 9, for example, authorizes Congress "[t]o constitute Tribunals inferior to the supreme Court" and Article III, § 1, states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Court's cases state the rule that "if inferior federal courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III." *Palmore* v. *United States*, 411 U. S. 389, 401 (1973).

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[3] We read *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379 (1930), as in accord with this conclusion. In that case, the Court referenced the language in *In re Burrus*, 136 U. S. 586 (1890), regarding the domestic relations exception and then held that a state court was not precluded by the Constitution and relevant federal statutes from exercising jurisdiction over a divorce suit brought against the Roumanian vice-consul. See 280 U. S., at 383–384.

This position has held constant since at least 1845, when the Court stated that "the judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis*, 3 How. 236, 245. See *Sheldon* v. *Sill*, 8 How. 441 (1850); *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U. S. 511 (1898); *Kline* v. *Burke Constr. Co.*, 260 U. S. 226 (1922); *Lockerty* v. *Phillips*, 319 U. S. 182 (1943). We thus turn our attention to the relevant jurisdictional statutes.

The Judiciary Act of 1789 provided that "the circuit courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature at common law or in equity, where the matter in dispute exceeds*, exclusive of costs, the sum or value of *five hundred dollars*, and . . . an alien is a party, or the suit is *between a citizen of the State where the suit is brought, and a citizen of another State.*" Act of Sept. 24, 1789, § 11, 1 Stat. 78 (emphasis added). The defining phrase, "all suits of a civil nature at common law or in equity," remained a key element of statutory provisions demarcating the terms of diversity jurisdiction until 1948, when Congress amended the diversity jurisdiction provision to eliminate this phrase and replace in its stead the term "all civil actions." 1948 Judicial Code and Judiciary Act, 62 Stat. 930, 28 U. S. C. § 1332.

The *Barber* majority itself did not expressly refer to the diversity statute's use of the limitation on "suits of a civil nature at common law or in equity." The dissenters in *Barber*, however, implicitly made such a reference, for they suggested that the federal courts had no power over certain

domestic relations actions because the court of chancery lacked authority to issue divorce and alimony decrees. Stating that "[t]he origin and the extent of [the federal courts'] jurisdiction must be sought in the laws of the United States, and in the settled rules and principles by which those laws have bound them," the dissenters contended that "as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded." *Barber*, 21 How., at 605 (Daniel, J., dissenting). Hence, in the dissenters' view, a suit seeking such relief would not fall within the statutory language "all suits of a civil nature at common law or in equity." Because the *Barber* Court did not disagree with this reason for accepting the jurisdictional limitation over the issuance of divorce and alimony decrees, it may be inferred fairly that the jurisdictional limitation recognized by the Court rested on this statutory basis and that the disagreement between the Court and the dissenters thus centered only on the extent of the limitation.

We have no occasion here to join the historical debate over whether the English court of chancery had jurisdiction to handle certain domestic relations matters, though we note that commentators have found some support for the *Barber* majority's interpretation.[4] Certainly it was not unprecedented at the time for the Court to infer, from what it under-

[4] See, *e. g.*, Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn. L. Rev. 1, 28 (1956); Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L. J. 571, 584–589 (1984); Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 Notre Dame L. Rev. 1, 15 (1984); Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824, 1834–1839 (1983); Note, The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation, 24 Boston College L. Rev. 661, 664–668 (1983).

stood to be English chancery practice, some guide to the meaning of the 1789 Act's jurisdictional grant. See, *e. g.*, *Robinson* v. *Campbell*, 3 Wheat. 212, 221–222 (1818). We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." As the court in *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F. 2d 509, 514 (CA2 1973), observed: "More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. . . . Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant." Considerations of *stare decisis* have particular strength in this context, where "the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989).

When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957); see also *Finley* v. *United States*, 490 U. S. 545, 554 (1989). With respect to such a longstanding and well-known construction of the diversity statute, and where Congress made substantive changes to the statute in other

respects, see 28 U. S. C. § 1332 note, we presume, absent any indication that Congress intended to alter this exception, see *ibid.;* Advisory Committee's Note 3 to Fed. Rule Civ. Proc. 2, 28 U. S. C. App., p. 555, that Congress "adopt[ed] that interpretation" when it reenacted the diversity statute. *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978).[5]

III

In the more than 100 years since this Court laid the seeds for the development of the domestic relations exception, the lower federal courts have applied it in a variety of circumstances. See, *e. g.*, cases cited in n. 1, *supra.* Many of these applications go well beyond the circumscribed situations posed by *Barber* and its progeny. *Barber* itself disclaimed federal jurisdiction over a narrow range of domestic relations issues involving the granting of a divorce and a decree of alimony, see 21 How., at 584, and stated the limits on federal-court power to intervene prior to the rendering of such orders:

> "It is, that when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony." *Id.*, at 591.

The *Barber* Court thus did not intend to strip the federal courts of authority to hear cases arising from the domestic

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[5] JUSTICE BLACKMUN criticizes us for resting upon Congress' apparent acceptance of the Court's earlier construction of the diversity statute in the 1948 codification. See *post*, at 708–709 (opinion concurring in judgment). We see nothing remarkable in this decision. See, *e. g.*, *Flood* v. *Kuhn*, 407 U. S. 258, 283–284 (1972).

relations of persons unless they seek the granting or modification of a divorce or alimony decree. The holding of the case itself sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction. Contrary to the *Barber* dissenters' position, the enforcement of such validly obtained orders does not "regulate the domestic relations of society" and produce an "inquisitorial authority" in which federal tribunals "enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household." *Id.*, at 602 (Daniel, J., dissenting). And from the conclusion that the federal courts lacked jurisdiction to issue divorce and alimony decrees, there was no dissent. See *id.*, at 604 (Daniel, J., dissenting) (noting that "[u]pon questions of settlement or of contract connected with marriages, the court of chancery will undertake the enforcement of such contracts, but does not decree alimony as such, and independently of such contracts"). See also *Simms* v. *Simms*, 175 U. S., at 167 (stating that "[i]t may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court").

Subsequently, this Court expanded the domestic relations exception to include decrees in child custody cases. In a child custody case brought pursuant to a writ of habeas corpus, for instance, the Court held void a writ issued by a Federal District Court to restore a child to the custody of the father. "As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction." *In re Burrus*, 136 U. S., at 594.

Although *In re Burrus* technically did not involve a construction of the diversity statute, as we understand *Barber* to have done, its statement that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *id.*, at 593–594, has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction. See, *e. g.*, *Bennett* v. *Bennett*, 221 U. S. App. D. C. 90, 93, 682 F. 2d 1039, 1042 (1982); *Solomon* v. *Solomon*, 516 F. 2d 1018, 1025 (CA3 1975); *Hernstadt* v. *Hernstadt*, 373 F. 2d 316, 317 (CA2 1967); see generally 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3609, pp. 477–479, nn. 28–32 (1984). This application is consistent with *Barber*'s directive to limit federal courts' exercise of diversity jurisdiction over suits for divorce and alimony decrees. See *Barber*, 21 How., at 584.[6] We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.

Not only is our conclusion rooted in respect for this long-held understanding, it is also supported by sound policy considerations. Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and

[6] The better reasoned views among the Courts of Appeals have similarly stated the domestic relations exception as narrowly confined to suits for divorce, alimony, or child custody decrees. See, *e. g.*, *McIntyre* v. *McIntyre*, 771 F. 2d, at 1317 (opinion of Kennedy, J.) ("[T]he exception to jurisdiction arises in those cases where a federal court is asked to grant a decree of divorce or annulment, or to grant custody or fix payments for support"); *Lloyd* v. *Loeffler*, 694 F. 2d, at 492 (same); *Bennett* v. *Bennett*, 221 U. S. App. D. C., at 93, 682 F. 2d, at 1042 (same); *Cole* v. *Cole*, 633 F. 2d, at 1087 (same).

deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees. See *Lloyd* v. *Loeffler*, 694 F. 2d 489, 492 (CA7 1982).

By concluding, as we do, that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree, we necessarily find that the Court of Appeals erred by affirming the District Court's invocation of this exception. This lawsuit in no way seeks such a decree; rather, it alleges that respondents Richards and Kesler committed torts against L. R. and S. R., Ankenbrandt's children by Richards. Federal subject-matter jurisdiction pursuant to § 1332 thus is proper in this case.[7] We now address whether, even though subject-matter jurisdiction might be proper, sufficient grounds exist to warrant abstention from the exercise of that jurisdiction.

IV

The Court of Appeals, as did the District Court, stated abstention as an alternative ground for its holding. The District Court quoted another federal court to the effect that "'[a]bstention, that doctrine designed to promote federal-state comity, is required when to render a decision would

[7] The courts below offered no explanation, and we are aware of none, why the domestic relations exception applies at all to respondent Kesler, who would appear to stand in the same position with respect to Ankenbrandt as any other opponent in a tort suit brought in federal court pursuant to diversity jurisdiction.

disrupt the establishment of a coherent state policy.'" App. to Pet. for Cert. A–6 (quoting *Zaubi* v. *Hoejme*, 530 F. Supp. 831, 836 (WD Pa. 1980)). It is axiomatic, however, that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813 (1976). Abstention rarely should be invoked, because the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Id.*, at 817.

The courts below cited *Younger* v. *Harris*, 401 U. S. 37 (1971), to support their holdings to abstain in this case. In so doing, the courts clearly erred. *Younger* itself held that, absent unusual circumstances, a federal court could not interfere with a pending state criminal prosecution. *Id.*, at 54. Though we have extended *Younger* abstention to the civil context, see, *e. g.*, *Middlesex County Ethics Comm.* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982); *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, 477 U. S. 619 (1986); *Pennzoil Co.* v. *Texaco Inc.*, 481 U. S. 1 (1987), we have never applied the notions of comity so critical to *Younger*'s "Our Federalism" when no state proceeding was pending nor any assertion of important state interests made. In this case, there is no allegation by respondents of any pending state proceedings, and Ankenbrandt contends that such proceedings ended prior to her filing this lawsuit. Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous.

It is not inconceivable, however, that in certain circumstances, the abstention principles developed in *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case

then at bar." *Colorado River Water Conservation Dist., supra,* at 814. Such might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties. Where, as here, the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying torts alleged, we have no difficulty concluding that *Burford* abstention is inappropriate in this case.[8]

V

We thus conclude that the Court of Appeals erred by affirming the District Court's rulings to decline jurisdiction based on the domestic relations exception to diversity jurisdiction and to abstain under the doctrine of *Younger* v. *Harris, supra.* The exception has no place in a suit such as this one, in which a former spouse sues another on behalf of children alleged to have been abused. Because the allegations in this complaint do not request the District Court to issue a divorce, alimony, or child custody decree, we hold that the

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[8] Moreover, should *Burford* abstention be relevant in other circumstances, it may be appropriate for the court to retain jurisdiction to ensure prompt and just disposition of the matter upon the determination by the state court of the relevant issue. Cf. *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U. S. 593, 594 (1968).

Though he acknowledges that our earlier cases invoking the domestic relations exceptions speak in jurisdictional terms, JUSTICE BLACKMUN nevertheless would reinterpret them to support a special abstention doctrine for such cases. See *post,* at 713–716 (opinion concurring in judgment). Yet in briefly sketching his vision of how such a doctrine might operate, JUSTICE BLACKMUN offers no authoritative support for where such an abstention doctrine might be found, no principled reason why we should retroactively concoct an abstention doctrine out of whole cloth to account for federal court practice in existence for 82 years prior to the announcement of the first abstention doctrine in *Railroad Comm'n of Texas* v. *Pullman Co.,* 312 U. S. 496 (1941), and no persuasive reason why articulation of such an abstention doctrine offers a sounder way of achieving the same result than our construction of the statute.

suit is appropriate for the exercise of § 1332 jurisdiction given the existence of diverse citizenship between petitioner and respondents and the pleading of the relevant amount in controversy. Accordingly, we reverse the decision of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that the District Court had jurisdiction over petitioner's claims in tort. Moreover, I agree that the federal courts should not entertain claims for divorce, alimony, and child custody. I am unable to agree, however, that the diversity statute contains any "exception" for domestic relations matters. The Court goes to remarkable lengths to craft an exception that is simply not in the statute and is not supported by the case law. In my view, the longstanding, unbroken practice of the federal courts in refusing to hear domestic relations cases is precedent at most for continued discretionary abstention rather than mandatory limits on federal jurisdiction. For these reasons I concur only in the Court's judgment.

I

The Court holds that the diversity statute contains an "exception" for cases seeking the issuance of a divorce, alimony, or child custody decree. *Ante*, at 701–704. Yet no such exception appears in the statute. The diversity statute is not ambiguous at all. It extends the jurisdiction of the district courts to "*all* civil actions" between diverse parties involving the requisite amount in controversy. 28 U. S. C. § 1332 (emphasis added).

This Court has recognized that in the absence of a "clearly expressed" intention to the contrary, the language of the statute itself is ordinarily "conclusive." See, *e. g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S.

102, 108 (1980). The Court apparently discovers in the history of the diversity statute and this Court's own case law a clearly expressed intention contrary to the words of the statute. First, the Court observes that the diversity statute formerly extended only to "all suits of a civil nature at common law or in equity" rather than to "all civil actions." *Ante*, at 698. Then the Court interprets this Court's decision in *Barber* v. *Barber*, 21 How. 582 (1859), to read into this "common law or equity" limitation an exclusion of matters, such as actions for divorce and alimony, that were not cognizable in the English courts of common law and equity. *Ante*, at 698–699. The Court points to what it regards as Congress' "apparent acceptance" of this construction of the diversity statute. *Ante*, at 700. Finally, notwithstanding Congress' replacement in 1948 of the "common law and equity" limitation with the phrase "all civil actions," the Court considers this to be evidence that Congress adopted the prior "well-known construction" of the diversity statute. *Ibid.*

I have great difficulty with the Court's approach. Starting at the most obvious point, I do not see how a language change that, if anything, expands the jurisdictional scope of the statute can be said to constitute evidence of approval of a prior narrow construction.[1] Any inaction on the part of Congress in 1948 in failing expressly to mention domestic relations matters in the diversity statute reflects the fact, as is discussed below, that Congress likely had no idea until the

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[1] To be sure, this modification in language was part of a wholesale revision of the Judicial Code in 1948, and this Court has recognized that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957); see *Finley* v. *United States*, 490 U. S. 545, 554 (1989). This principle may negate an inference that the change in language expanded the scope of the statute, but it does not affirmatively authorize an inference that Congress' recodification was designed to approve of prior constructions of the statute.

Court's decision today that the diversity statute contained an exception for domestic relations matters.

This leads to my primary concern: the Court's conclusion that Congress understood *Barber* as an interpretation of the diversity statute. *Barber* did not express any intent to construe the diversity statute—clearly, *Barber* "cited no authority and did not discuss the foundation for its announcement" disclaiming jurisdiction over divorce and alimony matters. *Ante*, at 694. As the Court puts it, it may only be "inferred" that the basis for declining jurisdiction was the diversity statute. *Ante*, at 699. It is inferred not from anything in the *Barber majority* opinion. Rather, it is inferred from the comments of a dissenting Justice and the absence of rebuttal by the *Barber* majority. *Ante*, at 699.[2] The Court today has a difficult enough time arriving at this unlikely interpretation of the *Barber* decision. I cannot imagine that Congress ever assembled this construction on its own.

In any event, at least three subsequent decisions of this Court seriously undermine any inference that *Barber*'s recognition of a domestic relations "exception" traces to a "common law or equity" limitation of the diversity statute. In *Simms* v. *Simms*, 175 U. S. 162 (1899), the Court heard an appeal by a husband from the Supreme Court of the Territory of Arizona affirming the territorial District Court's dismissal of his bill for divorce and its award to his wife of alimony and counsel fees *pendente lite*. The wife sought dismissal of the appeal to this Court because the suit involved domestic relations. In contrast to *Barber*, the Court

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[2] Moreover, as the Court intimates, *ante*, at 699, and n. 4, there is good reason to question the *Barber* dissent's interpretation of English practice. The historical evidence, while not unequivocal, suggests that the English chancery courts did in fact exercise some jurisdiction over matrimonial matters. See, *e. g.*, *Lloyd* v. *Loeffler*, 694 F. 2d 489, 491–492 (CA7 1982); *Spindel* v. *Spindel*, 283 F. Supp. 797, 802–803, 806–809 (EDNY 1968); Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L. J. 571, 584–585 (1984).

undertook an extensive review and discussion of the statutory bases for its jurisdiction over the appeal. It expressly recognized that its appellate jurisdiction was confined to "those cases, and those cases only, *at law or in equity.*" 175 U. S., at 167 (emphasis added).[3] Nevertheless, the Court in *Simms* did not find the "common law or equity" limitation to be a bar to jurisdiction.[4] The Court distinguished *Barber*, not on grounds that the jurisdictional statute in *Barber* was limited to cases in law and equity while that in *Simms* was not—indeed, it could not be so distinguished. The Court distinguished *Barber* on grounds that it involved domestic relations matters in the States rather than in the Territories. It reasoned that the whole subject of domestic relations "belongs to the laws of the State, and not to the laws of the United States," while "[i]n the Territories of the United States, Congress has the entire dominion and sovereignty, national and local." 175 U. S., at 167–168. Today the Court infers an interpretation of *Barber* that the Court in *Simms* plainly rejected.

The second decision undermining the Court's interpretation of *Barber* is *De la Rama* v. *De la Rama*, 201 U. S. 303 (1906), in which the Court took jurisdiction over an appeal

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[3] The Court stated:

"[T]he appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the Supreme Court of a Territory includes those cases, and those cases only, at law or in equity, in which 'the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.'" 175 U. S., at 167.

See also *id.*, at 166 (citing the Act of Mar. 3, 1885, ch. 355, 23 Stat. 443, limiting appellate jurisdiction from the territorial courts to "any suit at law or in equity").

[4] The Court concluded it could not review the question of divorce, because it involved "no matter of law, but mere questions of fact" and because, contrary to the statutory amount-in-controversy requirement, it involved "a matter the value of which could not be estimated in money." 175 U. S., at 168–169. It modified and affirmed the alimony award. *Id.*, at 172.

from the Supreme Court of the Philippine Islands in a wife's action for divorce and alimony. Citing *Barber*, *De la Rama* explained the historical reasons that federal courts have not exercised jurisdiction over actions for divorce and alimony. The "common law or equity" limitation the Court now finds so significant was not among those reasons.[5] This was so even though the appellate jurisdictional statute at issue there extended to "all actions, cases, causes, and proceedings," 32 Stat. 695, opening the door for the Court easily to have distinguished *Barber* on the grounds of the "common law or equity" limitation in the diversity statute. Instead, explicitly reaffirming the grounds relied upon in *Simms* for distinguishing *Barber*, the Court pointed to the absence of any need to defer to the States' regulation of the area of domestic relations in the context of an appeal from a nonstate, territorial court. 201 U. S., at 308.

The third decision is *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379 (1930). In *Popovici*, a Roumanian vice consul was sued by his wife in an Ohio state court for a divorce and alimony. He defended by claiming that the Ohio state court had no jurisdiction to grant the divorce, because federal statutes granted *exclusive* jurisdiction to the federal courts of "'all suits and proceedings against . . . consuls or vice-consuls'" and "'all suits against consuls and vice-consuls.'"

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[5] The Court in *De la Rama* justified the exception "both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value." 201 U. S., at 307. The first reason obviously was discounted by *De la Rama* itself and is of course untenable today. The second reason can apply only to nonmonetary divorce actions but not to actions for alimony above the amount-in-controversy limitation. The second reason, moreover, was disclaimed by *De la Rama* itself in joint divorce and alimony actions. *Id.*, at 310. At any rate, in view of *De la Rama*'s explanation, surely the Court is mistaken when it states it "has never addressed the basis" for the domestic relations exception. *Ante*, at 694.

Id., at 382–383 (quoting the Act of Mar. 3, 1911, ch. 231, 36 Stat. 1161, 1093). Rejecting this claim, Justice Holmes observed for a unanimous Court that the jurisdictional statutes "do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce." 280 U. S., at 383. The Court traced this absence of jurisdiction not to the diversity statute but apparently to the Constitution itself:

> "If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts." *Id.*, at 383–384.

I think it implausible to believe that, especially after *Popovici*, Congress could be said to have accepted this Court's decision in *Barber* as simply a construction of the diversity statute.[6] Accordingly, the Court is without a requisite foundation for ratifying what Congress intended. Cf. *Flood* v. *Kuhn*, 407 U. S. 258, 283–284 (1972) (declining to overturn

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[6] The Court claims that "by hearing appeals from legislative, or Article I, courts, this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction from *Barber* was *not* Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts." *Ante*, at 696–697. The Court, however, overlooks the rule that "[w]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974); see *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 119 (1984). This Court has never understood the rule differently. *United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C. J.) (statement at oral argument).

prior precedent *explicitly* exempting professional baseball from antitrust laws where Congress "by its positive inaction" has allowed prior decisions to stand).

Even assuming the Court today correctly interprets *Barber*, its extension of any domestic relations "exception" to the diversity statute for child custody matters is not warranted by any known principles of statutory construction. The Court relies on *In re Burrus*, 136 U. S. 586 (1890), in which the Court denied the "jurisdiction" of a Federal District Court to issue a writ of habeas corpus in favor of a father to recover the care and custody of his child from the child's grandfather. That case did not involve the diversity statute, but rather the habeas corpus statute, and the Court expressly declined to address the diversity statute.[7] *Id.*, at 597. To the Court today this is just a "technica[l]" distinction. *Ante*, at 703. I find it germane, because, to the best of my knowledge, a court is not at liberty to craft exceptions to statutes that are not at issue in a case.

II

A

To reject the Court's construction of the diversity statute is not, however, necessarily to reject the federal courts' long-

[7] If, in *Barber*, the Court might have been said plausibly to have relied on limitations of the English chancery courts with respect to divorce and alimony, it seems highly unlikely that the Court in *Burrus* might have relied on a similar justification for child custody matters. The Court in *Burrus* attached as an appendix to its opinion, 136 U. S., at 597, a "very instructive" and "a very careful and a very able opinion," *In the Matter of Barry*, from the Circuit Court of the United States for the Southern District of New York. See *In re Burrus*, 136 U. S., at 594. That opinion stated that child custody matters "res[t] solely in England on the common law" and that such determinations "devolved upon the high courts of equity and law." *Id.*, at 609. See also *Lehman* v. *Lycoming County Children's Services Agency*, 458 U. S. 502, 524 (1982) (dissenting opinion) ("Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights").

standing practice of declining to hear certain domestic relations cases. My point today is that no coherent "jurisdictional" explanation for this practice emerges from our line of such cases, and it is unreasonable to presume that Congress divined and accepted one from these cases. To be sure, this Court's old line of domestic relations cases disclaimed "jurisdiction" over domestic relations matters well before the growth and general acceptance in recent decades of modern doctrines of federal abstention that distinguish the refusal to exercise jurisdiction from disclaiming jurisdiction altogether. See generally C. Wright, Federal Courts 302–330 (1983) (discussing growth of traditional abstention doctrines). See also *Francis* v. *Henderson*, 425 U. S. 536, 538–539 (1976) (recognizing abstention in the context of the habeas corpus statute where "considerations of comity and concerns for the orderly administration of criminal justice require"). Nevertheless, the common concern reflected in these earlier cases is, in modern terms, abstentional—and not jurisdictional—in nature. These cases are premised not upon a concern for the historical limitation of equity jurisdiction of the English courts, but upon the virtually exclusive primacy at that time of the States in the regulation of domestic relations. As noted above, in *Simms* and *De la Rama*, this Court justified its exercise of jurisdiction over actions for divorce and alimony not by any reference to the scope of equity jurisdiction but by reference to the absence of any interest of the States in appeals from courts in territories controlled by the National Government. Similarly, in cases wholly outside the "common law or equity" limitation of the diversity statute, the Court has denied federal court review. *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379 (1930) (consuls and vice-consuls statutes); *In re Burrus*, *supra* (habeas corpus). As the Court once stated: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.*, at 593–594.

Whether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area.[8] I am confident, nonetheless, that the unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases provides the very rare justification for continuing to do so. It is not without significance, moreover, that, because of this historical practice of the federal courts, the States have developed specialized courts and institutions in family matters, while Congress and the federal courts generally have not done so. Absent a contrary command of Congress, the federal courts properly should abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody.

The Court is correct that abstention "rarely should be invoked." *Ante*, at 705. But rarer still—and by far the greater affront to Congress—should be the occasions when this Court invents statutory exceptions that are simply not there. It is one thing for this Court to defer to more than a century of practice unquestioned by Congress. It is quite

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[8] See, *e. g.*, Victims of Child Abuse Act of 1990, 104 Stat. 4792, 42 U. S. C. § 13001 *et seq.*; Family Violence Prevention and Services Act, 98 Stat. 1757, 42 U. S. C. § 10401 *et seq.*; Parental Kidnaping Prevention Act of 1980, 94 Stat. 3568, 28 U. S. C. § 1738A; Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500–521, 42 U. S. C. §§ 620–628, 670–679a; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 92 Stat. 208–211, 42 U. S. C. §§ 5111–5115; Child Abuse Prevention and Treatment Act, 88 Stat. 4, 42 U. S. C. § 5101 *et seq.*

Like the diversity statute, the federal-question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal-question cases to "Cases, in Law and Equity." Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal-question jurisdiction (as under 28 U. S. C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody.

another to defer on a pretext that Congress legislated what in fact it never did. Although there is no occasion to resolve the issue in definitive fashion in this case, I would suggest that principles of abstention provide a more principled basis for the Court's continued disinclination to entertain domestic relations matters.[9]

B

Whether or not the domestic relations "exception" is properly grounded in principles of abstention or principles of jurisdiction, I do not believe this case falls within the exception. This case only peripherally involves the subject of "domestic relations." "Domestic relations" actions are loosely classifiable into four categories. The first, or "core," category involves declarations of status, *e. g.*, marriage, annulment, divorce, custody, and paternity. The second, or "semicore," category involves declarations of rights or obligations arising from status (or former status), *e. g.*, alimony, child support, and division of property. The third category consists of secondary suits to enforce declarations of status, rights, or obligations. The final, catchall category covers the suits not directly involving status or obligations arising from status but that nonetheless generally relate to domestic relations matters, *e. g.*, tort suits between family or former family members for sexual abuse, battering, or intentional infliction of emotional distress. None of this Court's prior cases that consider the domestic relations "exception" involves the type of periphery domestic relations claim at issue here.

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[9] As this Court has previously observed that the various types of abstention are not "rigid pigeonholes," *Pennzoil Co.* v. *Texaco Inc.*, 481 U. S. 1, 11, n. 9 (1987); *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 491 U. S. 350, 359 (1989), there is no need to affix a label to the abstention principles I suggest. Nevertheless, I fully agree with the Court that *Younger* abstention is inappropriate on the facts before us, because of the absence of any pending state proceeding.

Petitioner does not seek a determination of status or obligations arising from status. Moreover, any federal court determination of petitioner's claims will neither upset a prior state court determination of status or obligations appurtenant to status nor pre-empt a pending state court determination of this nature. Cf. *Moore* v. *Sims*, 442 U. S. 415 (1979) (applying *Younger* abstention doctrine to prevent federal court action seeking to enjoin pending state child custody proceeding brought by state authorities). While petitioner's claims do not involve a federal question or statute—the presence of which would strongly counsel against abstention, see *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 815, n. 21 (1976)—petitioner's state-law tort claims for money damages are easily cognizable in a federal court. All these considerations favor the exercise of federal jurisdiction over petitioner's claims.

JUSTICE STEVENS, with whom JUSTICE THOMAS joins, concurring in the judgment.

This should be an exceedingly easy case.* As demonstrated by each of the opinions, whatever belief one holds as to the existence, origin, or scope of a "domestic relations exception," the exception does not apply here. However one understands 18th-century English chancery practice and however one construes the Judiciary Act of 1789, the result is the same. The judgment of the Court of Appeals must be

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*The first Justice Harlan cautioned long ago that "'it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law.'" *United States* v. *Clark*, 96 U. S. 37, 49 (1878) (dissenting opinion) (quoting *East India Co.* v. *Paul*, 7 Moo. 85, 111, 13 Eng. Rep. 811, 821 (P. C. 1849)). Courts should observe similar caution with regard to easy cases. Cf. *O'Bannon* v. *Town Court Nursing Center*, 447 U. S. 773, 804 (1980) (BLACKMUN, J., concurring in judgment) ("[E]asy cases make bad law"); *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 640 (1990) (STEVENS, J., concurring in judgment). An easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case.

reversed. For that reason, I would leave for another day consideration of whether any domestic relations cases necessarily fall outside of the jurisdiction of the federal courts and of what, if any, principle would justify such an exception to federal jurisdiction.

As I agree that this case does not come within any domestic relations exception that might exist, I concur in the judgment.

Syllabus

MORGAN *v.* ILLINOIS

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 91–5118. Argued January 21, 1992—Decided June 15, 1992

The trial of a capital offense in Illinois is conducted in two phases, with the same jury determining both a defendant's guilt and whether the death penalty should be imposed. In accordance with state law, the trial court conducted the *voir dire* to select the jury for petitioner Morgan's capital murder trial. The State requested, pursuant to *Witherspoon* v. *Illinois*, 391 U. S. 510, that the court ask the jurors whether they would automatically vote against the death penalty no matter what the facts of the case were. However, the court refused Morgan's request to ask if any jurors would automatically vote to impose the death penalty regardless of the facts, stating that it had asked substantially that question. In fact, every empaneled juror was asked generally whether each could be fair and impartial, and most were asked whether they could follow "instructions on the law." Morgan was convicted and sentenced to death. The State Supreme Court affirmed, ruling that a trial court is not required to include in *voir dire* a "life qualifying" or "reverse-*Witherspoon*" question upon request.

Held: The trial court's refusal to inquire whether potential jurors would automatically impose the death penalty upon convicting Morgan is inconsistent with the Due Process Clause of the Fourteenth Amendment. Pp. 725–739.

(a) Due process demands that a jury provided to a capital defendant at the sentencing phase must stand impartial and indifferent to the extent commanded by the Sixth Amendment. See, *e. g.*, *id.*, at 518. Pp. 726–728.

(b) Based on this impartiality requirement, a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty. Such a juror will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require. Cf., *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412, 424. Pp. 728–729.

(c) On *voir dire* a trial court must, at a defendant's request, inquire into the prospective jurors' views on capital punishment. Part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. Morgan could not exercise intelligently his challenge for cause against prospective jurors who would unwaveringly impose death after a finding of guilt unless he was given the

Syllabus

opportunity to identify such persons by questioning them at *voir dire* about their views on the death penalty. Cf. *Lockhart* v. *McCree*, 476 U. S. 162, 170, n. 7. Absent that opportunity, his right not to be tried by those who would *always* impose death would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who *never* do so. Pp. 729–734.

(d) The trial court's *voir dire* was insufficient to satisfy Morgan's right to make inquiry. The State's own request for questioning under *Witherspoon* and *Witt* belies its argument that the general fairness and "follow the law" questions asked by the trial court were enough to detect those in the venire who would automatically impose death. Such jurors could in all truth and candor respond affirmatively to both types of questions, personally confident that their dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, the belief that death should be imposed *ipso facto* upon conviction reflects directly on an individual's inability to follow the law. Pp. 734–736.

(e) A juror to whom mitigating evidence is irrelevant is plainly saying that such evidence is not worth consideration, a view which has long been rejected by this Court and which finds no basis in Illinois statutory or decisional law. Here, the instruction accords with the State's death penalty statute, which requires that the jury be instructed to consider any relevant aggravating and mitigating factors, lists certain relevant mitigating factors, and directs the jury to consider whether the mitigating factors are "sufficient to preclude" the death penalty's imposition. Since the statute plainly indicates that a lesser sentence is available in every case where mitigating evidence exists, a juror who would invariably impose the death penalty would not give the mitigating evidence the consideration the statute contemplates. Pp. 736–739.

142 Ill. 2d 410, 568 N. E. 2d 755, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 739.

Allen H. Andrews III argued the cause and filed briefs for petitioner.

Kenneth L. Gillis argued the cause for respondent. With him on the brief were *Roland W. Burris*, Attorney General of Illinois, *Terence M. Madsen*, Assistant Attorney General,

Jack O'Malley, Randall E. Roberts, Sally L. Dilgart, William D. Carroll, and *Marie Quinlivan Czech.**

JUSTICE WHITE delivered the opinion of the Court.

We decide here whether, during *voir dire* for a capital offense, a state trial court may, consistent with the Due Process Clause of the Fourteenth Amendment, refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant.

I

The trial of a capital offense in Illinois is conducted in two phases. The defendant must first be convicted of first-degree murder, as defined in Ill. Rev. Stat., ch. 38, ¶ 9–1(a) (Supp. 1990). Illinois law uses the same jury that decided guilt to determine whether the death penalty shall be imposed,[1] and upon conviction, a separate sentencing hearing commences to determine the existence of aggravating and mitigating factors. ¶ 9–1(d)(1). To be eligible for the death penalty, the jury must find unanimously, ¶ 9–1(g), and beyond a reasonable doubt, ¶ 9–1(f), that the defendant was at least 18 years old at the time of the murder, and that at least 1 of 10 enumerated aggravating factors exists, ¶ 9–1(b). See, *e. g.*, ¶ 9–1(b)(5) (murder for hire or by contract); ¶ 9–1(b)(10) (premeditated murder by preconceived plan). If the jury finds none of the statutory aggravating factors to exist, the defendant is sentenced to a term of imprisonment. ¶ 9–1(g). "If there is a unanimous finding by the jury that one or more

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Robert L. Graham, Laura A. Kaster, Harvey Grossman, John A. Powell, Steven Shapiro,* and *Diann Rust-Tierney;* and for the National Association of Criminal Defense Lawyers by *Andrea D. Lyon.*

[1] The defendant may, however, elect to waive sentencing by the jury. Ill. Rev. Stat., ch. 38, ¶ 9–1(d)(3) (Supp. 1990). The procedure and standards that guide a sentencing judge, ¶ 9–1(h), are identical to those that guide a jury, ¶ 9–1(g).

of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed." *Ibid.* As part of this balance, the jury is instructed to consider mitigating factors existing in the case, five of which are enumerated, but which are not exclusive. ¶ 9–1(c). The State may also present evidence of relevant aggravating factors beyond those enumerated by statute. *Ibid.* "If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." ¶ 9–1(g).

Petitioner Derrick Morgan was convicted in Cook County, Illinois, of first-degree murder and sentenced to death. The evidence at trial amply proved that petitioner was hired to kill a narcotics dealer apparently competing with the El Rukns, one of Chicago's violent inner-city gangs. For $4,000, petitioner lured the dealer, who was a friend, into an abandoned apartment and shot him in the head six times. Upon consideration of factors in aggravation and mitigation, the jury sentenced him to death.

Three separate venires were required to be called before the jury was finally chosen. In accordance with Illinois law, the trial court, rather than the attorneys, conducted *voir dire*. *People* v. *Gacy*, 103 Ill. 2d 1, 36–37, 468 N. E. 2d 1171, 1184–1185 (1984). The State, having elected to pursue capital punishment, requested inquiry permitted by *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), to determine whether any potential juror would in all instances refuse to impose the death penalty upon conviction of the offense. Accordingly, the trial court, over opposition from the defense, questioned each venire whether any member had moral or religious principles so strong that he or she could not impose the death penalty "regardless of the facts." App. 9, 78, 90. Seventeen potential jurors were excused when they ex-

pressed substantial doubts about their ability to follow Illinois law in deciding whether to impose a sentence of death. *Id.*, at 9–22, 79–83, 90–94. All of the jurors eventually empaneled were also questioned individually under *Witherspoon*, each receiving and responding in the negative to this question or a slight variation: "Would you automatically vote against the death penalty no matter what the facts of the case were?" App. 33; see *id.*, at 36, 41, 48, 55, 59, 64, 69, 76, 88, 97, 103.

After seven members of the first venire had been questioned, including three who eventually became jurors, petitioner's counsel requested the trial court to ask all prospective jurors the following question: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.*, at 44. The trial court refused this request, stating that it had "asked the question in a different vein substantially in that nature." *Ibid.*

Prior to the *voir dire* of the three venires, the trial court had explained in general terms the dictates of Illinois procedure in capital trials, as outlined above. See *id.*, at 24, 77–78, 90. During *voir dire*, the trial court received from 9 of the 12 jurors empaneled an affirmative response to variations of this question: "Would you follow my instructions on the law even though you may not agree?" *Id.*, at 30; see *id.*, at 38, 43, 49, 56, 60, 64, 69, 107. However, the trial court did not ask three of the jurors this question in any way. See *id.*, at 73–77, 83–89, 94–100. Every juror eventually empaneled was asked generally whether each could be fair and impartial.[2] Each juror responded appropriately to at least one

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[2] Such questioning led to the removal for cause of one prospective juror, following this exchange:

"Q Would you follow my instructions on the law in the case even though you might not agree?

"A Yes.

[Footnote 2 is continued on p. 724]

of these questions, or a variation: (1) "Do you know of any reason why you cannot be fair and impartial?", *id.*, at 33; see *id.*, at 41, 49, 64, 68, 75, 88, 99; (2) "Do you feel you can give both sides a fair trial?", *id.*, at 70; see *id.*, at 35, 38, 43, 49, 56, 61, 65, 77, 100, 110. When empaneled, each member of the jury further swore an oath to "well and truly try the issues joined herein and true deliverance make between the People of the State of Illinois and the defendant at the bar and a true verdict render according to the law and the evidence." 1 Tr. 601–602; see *id.*, at 264, 370, 429, 507, 544, 575–576.

On appeal, the Illinois Supreme Court affirmed petitioner's conviction and death sentence, rejecting petitioner's claim that, pursuant to *Ross* v. *Oklahoma*, 487 U. S. 81 (1988), *voir dire* must include the "life qualifying" or "reverse-*Witherspoon*" question upon request. The Illinois Supreme Court concluded that nothing requires a trial court to question potential jurors so as to identify and exclude any who would vote for the death penalty in every case after conviction for a capital offense. 142 Ill. 2d 410, 470, 568 N. E. 2d 755, 778 (1991).[3] That court also found no violation

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"Q Do you know any reason why you cannot give this defendant a fair trial?

"A I would have no problem during the trial. If it came—I had a friend's parents murdered twelve years ago before capital punishment. I would give a fair trial. If he is found guilty, I would want him hung.

"Q You couldn't be fair and impartial throughout the proceedings?

"A No.

"Q You are excused." App. 72–73.

[3] The Illinois Supreme Court has subsequently emphasized that decision in this case was not meant "to imply that the 'reverse-*Witherspoon*' question is inappropriate. Indeed, given the type of scrutiny capital cases receive on review, one would think trial courts would go out of their way to afford a defendant every possible safeguard. The 'reverse-*Witherspoon*' question may not be the only means of ensuring defendant an impartial jury, but it is certainly the most direct. The best way to ensure that a prospective juror would not automatically vote for the death penalty is to ask." *People* v. *Jackson*, 145 Ill. 2d 43, 110, 582 N. E. 2d

of *Ross*, concluding instead that petitioner's jury "was selected from a fair cross-section of the community, each juror swore to uphold the law regardless of his or her personal feelings, and no juror expressed any views that would call his or her impartiality into question." 142 Ill. 2d, at 470, 568 N. E. 2d, at 778.

We granted certiorari because of the considerable disagreement among state courts of last resort on the question at issue in this case.[4] 502 U. S. 905 (1991). We now reverse the judgment of the Illinois Supreme Court.

II

We have emphasized previously that there is not "any one right way for a State to set up its capital sentencing

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125, 156 (1991). See also *State* v. *Atkins*, 303 S. C. 214, 222–223, 399 S. E. 2d 760, 765 (1990).

[4] Delaware and South Carolina agree with Illinois that the "reverse-*Witherspoon*" inquiry is unnecessary so long as, by questions and oath, each juror swears to be fair and impartial and to follow the law. See *Riley* v. *State*, 585 A. 2d 719, 725–726 (Del. 1990), cert. denied, 501 U. S. 1223 (1991); *State* v. *Hyman*, 276 S. C. 559, 563, 281 S. E. 2d 209, 211–212 (1981), cert. denied, 458 U. S. 1122 (1982). Missouri appears to be of this view as well. *State* v. *McMillin*, 783 S. W. 2d 82, 94 (Mo.), cert. denied, 498 U. S. 881 (1990). California, Georgia, Louisiana, New Jersey, North Carolina, Utah, and Virginia disagree, see *People* v. *Bittaker*, 48 Cal. 3d 1046, 1083–1084, 774 P. 2d 659, 679 (1989); *Skipper* v. *State*, 257 Ga. 802, 806–807, 364 S. E. 2d 835, 839 (1988); *State* v. *Henry*, 196 La. 217, 232–234, 198 So. 910, 914–916 (1940); *State* v. *Williams*, 113 N. J. 393, 415–417, 550 A. 2d 1172, 1182–1184 (1988); *State* v. *Rogers*, 316 N. C. 203, 216–218, 341 S. E. 2d 713, 722 (1986); *State* v. *Norton*, 675 P. 2d 577, 588–589 (Utah 1983), cert. denied, 466 U. S. 942 (1984); *Patterson* v. *Commonwealth*, 222 Va. 653, 657–660, 283 S. E. 2d 212, 214–216 (1981), as apparently do Arkansas, Florida, and Kentucky, see *Pickens* v. *State*, 292 Ark. 362, 366–367, 730 S. W. 2d 230, 233–234, cert. denied, 484 U. S. 917 (1987); *Gore* v. *State*, 475 So. 2d 1205, 1206–1208 (Fla. 1985), cert. denied, 475 U. S. 1031 (1986); *Morris* v. *Commonwealth*, 766 S. W. 2d 58, 60 (Ky. 1989). Lower courts in Alabama also follow this latter view. See *Bracewell* v. *State*, 506 So. 2d 354, 358 (Ala. Crim. App. 1986); cf. *Henderson* v. *State*, 583 So. 2d 276, 283–284 (Ala. Crim. App. 1990) (no "plain error" in trial court's failure *sua sponte* to "life qualify" the prospective jurors), aff'd, 583 So. 2d 305 (1991).

scheme," *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984) (citations omitted), and that no State is constitutionally required by the Sixth Amendment or otherwise to provide for jury determination of whether the death penalty shall be imposed on a capital defendant, *ibid.* Illinois has chosen, however, to delegate to the jury this task in the penalty phase of capital trials in addition to its duty to determine guilt or innocence of the underlying crime. The issue, therefore, is whether petitioner is entitled to relief under the Due Process Clause of the Fourteenth Amendment. We conclude that he is, and in the course of doing so we deal with four issues: whether a jury provided to a capital defendant at the sentencing phase must be impartial; whether such defendant is entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law; whether on *voir dire* the court must, on defendant's request, inquire into the prospective jurors' views on capital punishment; and whether the *voir dire* in this case was constitutionally sufficient.

A

Duncan v. *Louisiana*, 391 U. S. 145 (1968), held that the Fourteenth Amendment guaranteed a right of jury trial in all state criminal cases which, were they tried in a federal court, would come within the Sixth Amendment's guarantee of trial by jury. Prior to this decision applying the Sixth Amendment's jury trial provision to the States, we recognized in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), and in *Turner* v. *Louisiana*, 379 U. S. 466 (1965), that the Fourteenth Amendment's Due Process Clause itself independently required the impartiality of any jury empaneled to try a cause:

> "Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay* v. *New York*, 332 U. S. 261 [(1947)]; *Palko* v. *Connecticut*, 302 U. S. 319 [(1937)],

> every State has constitutionally provided trial by jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578–579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257 [(1948)]; *Tumey* v. *Ohio*, 273 U. S. 510 [(1927)]. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U. S. 133, 136 [(1955)]. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199 [(1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds* v. *United States*, 98 U. S. 145, 155 [(1879)]." *Irvin* v. *Dowd*, *supra*, at 721–722 (footnote omitted).

In *Turner* v. *Louisiana*, we relied on this passage to delineate "the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord." 379 U. S., at 471. In short, as reflected in the passage above, due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment. *Id.*, at 472, and n. 10; cf. *Groppi* v. *Wisconsin*, 400 U. S. 505, 508–511 (1971).

Thus it is that our decisions dealing with capital sentencing juries and presenting issues most analogous to that which we decide here today, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S., at 518; *Adams* v. *Texas*, 448 U. S. 38, 40 (1980); *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985); *Ross* v. *Oklahoma*, 487 U. S., at 85, have relied on the strictures dictated by the Sixth *and* Fourteenth Amendments to ensure the impartiality of any jury that will undertake capital sentencing. See also *Turner* v. *Murray*, 476 U. S. 28, 36, and n. 9 (1986) (plurality opinion).

B

Witt held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U. S., at 424 (quoting *Adams* v. *Texas*, *supra*, at 45). Under this standard, it is clear from *Witt* and *Adams*, the progeny of *Witherspoon*, that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.

Thereafter, in *Ross* v. *Oklahoma*, *supra*, a state trial court refused to remove for cause a juror who declared he would vote to impose death automatically if the jury found the defendant guilty. That juror, however, was removed by the defendant's use of a peremptory challenge, and for that reason the death sentence could be affirmed. But in the course of reaching this result, we announced our considered view that because the Constitution guarantees a defendant on trial for his life the right to an impartial jury, 487 U. S., at 85, the trial court's failure to remove the juror for cause was constitutional error under the standard enunciated in *Witt*. We emphasized that "[h]ad [this juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's

failure to remove [the juror] for cause, the sentence would have to be overturned." 487 U. S., at 85 (citing *Adams*, *supra*).

We reiterate this view today. A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

C

Illinois, in fact, raises no challenge to the foregoing precepts, but argues instead that the trial court, in its discretion, may refuse direct inquiry into this matter, so long as its other questioning purports to assure the defendant a fair and impartial jury able to follow the law. It is true that "*[v]oir dire* 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" *Ristaino* v. *Ross*, 424 U. S. 589, 594 (1976) (quoting *Connors* v. *United States*, 158 U. S. 408, 413 (1895)). The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. *Dennis* v. *United States*, 339 U. S. 162, 171–172 (1950); *Morford* v. *United States*, 339 U. S. 258, 259 (1950). "*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the

trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge* v. *United States*, 283 U. S. 308, 310 (1931).[5]

The adequacy of *voir dire* is not easily the subject of appellate review, *Rosales-Lopez*, *supra*, at 188, but we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections, see, *e. g.*, *Turner* v. *Murray*, *supra*, at 36–37; *Ham* v. *South Carolina*, 409 U. S. 524, 526–527 (1973). Our holding in *Ham*, for instance, was as follows:

> "Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' *e. g.*, *Lisenba* v. *California*, 314 U. S. 219, 236 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, *Slaughter-House Cases*, 16 Wall. 36, 81 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the

[5] See *Mu'Min* v. *Virginia*, 500 U. S. 415, 425–426 (1991): "To be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."

petitioner be permitted to have the jurors interrogated on the issue of racial bias." *Id.*, at 526–527.

We have also come to recognize that the principles first propounded in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), the reverse of which are at issue here, demand inquiry into whether the views of prospective jurors on the death penalty would disqualify them from sitting.[6] At its inception, *Witherspoon* conferred no "right" on a State, but was in reality a limitation of a State's making unlimited challenges for cause to exclude those jurors who "might hesitate" to return a verdict imposing death. *Id.*, at 512–513; see *Adams* v. *Texas*, 448 U. S., at 47–49. Upon consideration of the jury in *Witherspoon*, drawn as it was from a venire from which the State struck any juror expressing qualms about the death penalty,

[6] Illinois argues that, because of the changed structure in death penalty jurisprudence since *Furman* v. *Georgia*, 408 U. S. 238 (1972), *Witherspoon* principles should no longer guide this area. But analogous arguments have been previously raised and rejected. *Adams* v. *Texas*, 448 U. S. 38, 45–47 (1980). When considering the Texas death penalty scheme in light of *Witherspoon*, we stated: "[J]urors in Texas must determine whether the evidence presented by the State convinces them beyond reasonable doubt that each of the three questions put to them must be answered in the affirmative. In doing so, they must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings. Jurors will characteristically know that affirmative answers to the questions will result in the automatic imposition of the death penalty, and each of the jurors whose exclusion is challenged by petitioner was so informed. In essence, Texas juries must be allowed to consider 'on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.' *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Adams*, *supra*, at 46 (citation omitted). The balancing approach chosen by Illinois vests considerably more discretion in the jurors considering the death penalty, and, with stronger reason, *Witherspoon*'s general principles apply. Cf. *Turner* v. *Murray*, 476 U. S. 28, 34–35 (1986) (plurality opinion).

we found it "self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." 391 U. S., at 518. To preserve this impartiality, *Witherspoon* constrained the State's exercise of challenges for cause:

> "[A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." *Id.*, at 520–523 (footnotes omitted).

See also *Lockhart* v. *McCree*, 476 U. S. 162, 179–180 (1986). *Witherspoon* limited a State's power broadly to exclude jurors hesitant in their ability to sentence a defendant to death, but nothing in that decision questioned "the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them . . . ." 391 U. S., at 522, n. 21 (emphasis in original); see also *id.*, at 513–514.

In *Wainwright* v. *Witt*, 469 U. S. 412 (1985), we revisited footnote 21 of *Witherspoon*, and held affirmatively that "the State may exclude from capital sentencing juries that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties in accord-

ance with their instructions or their oaths." 469 U. S., at 424, n. 5; see also *Lockett* v. *Ohio*, 438 U. S. 586, 595–596 (1978). Indeed, in *Lockhart* v. *McCree* we thereafter spoke in terms of "'*Witherspoon*-excludables'" whose removal for cause "serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a capital] case." 476 U. S., at 180. From *Witt*, moreover, it was but a very short step to observe as well in *Lockhart:*

> "[T]he State may challenge for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent them from impartially determining a capital defendant's guilt or innocence. *Ipso facto*, the State must be given the opportunity to identify such prospective jurors by questioning them at *voir dire* about their views of the death penalty." 476 U. S., at 170, n. 7.

This passage in *Lockhart* expanded but briefly upon what we had already recognized in *Witt:* "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper." 469 U. S., at 423 (citation omitted; emphasis added).

We deal here with petitioner's ability to exercise intelligently his complementary challenge for cause against those biased persons on the venire who as jurors would unwaveringly impose death after a finding of guilt. Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and

meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.[7]

D

The only issue remaining is whether the questions propounded by the trial court were sufficient to satisfy petitioner's right to make inquiry. As noted above, Illinois suggests that general fairness and "follow the law" questions, of the like employed by the trial court here, are enough to detect those in the venire who automatically would vote for the death penalty.[8] The State's own request for questioning under *Witherspoon* and *Witt* of course belies this argument. *Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views pre-

[7] As the Fifth Circuit has observed *obiter dictum:* "All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to *either* side of the case. Clearly, the extremes must be eliminated—*i. e.*, those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." *Smith* v. *Balkcom*, 660 F. 2d 573, 578 (1981) (emphasis in original), modified, 671 F. 2d 858, cert. denied, 459 U. S. 882 (1982).

[8] Almost in passing the State also suggests that the "reverse-*Witherspoon*" inquiry is inapposite because of a putative "quantitative difference." Illinois requires a unanimous verdict in favor of imposing death, see *supra*, at 721–722; thus any one juror can nullify the imposition of the death penalty. "Persons automatically for the death penalty would not carry the same weight," Illinois argues, "because persons automatically for the death penalty would still need to persuade the remaining eleven jurors to vote *for* the death penalty." Brief for Respondent 27. The dissent chooses to champion this argument, *post*, at 750, although it is clearly foreclosed by *Ross* v. *Oklahoma*, 487 U. S. 81, 85 (1988), where we held that even one such juror on the panel would be one too many. See *supra*, at 728–729. In any event, the measure of a jury is taken by reference to the impartiality of each, individual juror. Illinois has chosen to provide a capital defendant 12 jurors to decide his fate, and each of these jurors must stand equally impartial in his or her ability to follow the law.

venting or substantially impairing their duties in accordance with their instructions and oath. But such jurors—whether they be unalterably in favor of, or opposed to, the death penalty in every case—by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.

As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law. See *supra*, at 729. Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law. See *Turner* v. *Murray*, 476 U. S., at 34–35 (plurality opinion). It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.[9] A defendant on trial for his life must be permitted on *voir dire*

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[9] That certain prospective jurors maintain such inconsistent beliefs—that they can follow the law, but that they will always vote to impose death for conviction of a capital offense—has been demonstrated, even in this case. See n. 2, *supra*. Indeed, in *Wainwright* v. *Witt*, 469 U. S. 412 (1985), we set forth the following exchange, highlighting this inconsistency in beliefs in regards to *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968):

"THE COURT: Wait a minute, ma'am. I haven't made up my mind yet. Just have a seat. Let me ask you these things. Do you have any prefixed ideas about this case at all?

"[A]: Not at all.

"THE COURT: Will you follow the law that I give you?

"[A]: I could do that.

"THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you be unable to follow the law of this State.

"[A]: I could not bring back a death penalty.

"THE COURT: Step down." 469 U. S., at 432, n. 12.

to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Id.*, at 36 (footnote omitted). Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty.

III

JUSTICE SCALIA, in dissent, insists that Illinois is entitled to try a death penalty case with 1 or even 12 jurors who upon inquiry announce that they would automatically vote to impose the death penalty if the defendant is found guilty of a capital offense, no matter what the so-called mitigating factors, whether statutory or nonstatutory, might be. *Post*, at 742–746. But such jurors obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it. While JUSTICE SCALIA's jaundiced view of our decision today may best be explained by his rejection of the line of cases tracing from *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and developing the nature and role of mitigating evidence in the trial of capital offenses, see *Walton* v. *Arizona*, 497 U. S. 639, 669–673 (1990) (SCALIA, J., concurring in part and concurring in judgment); *Payne* v. *Tennessee*, 501 U. S. 808, 833 (1991) (SCALIA, J., concurring); *Sochor* v. *Florida*, *ante*, at 554 (SCALIA, J., concurring in part and dissenting in part), it is a view long rejected by this Court. More important to our purposes here, however, his view finds no support in either the statutory or decisional law of Illinois because that law is consistent with the requirements concerning mitigating evi-

dence described in this Court's cases. See *Turner* v. *Murray*, *supra*, at 34–35 (plurality opinion).

The Illinois death penalty statute provides that "[t]he court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty," Ill. Rev. Stat., ch. 38, ¶ 9–1(c) (Supp. 1990), and lists certain mitigating factors that the legislature must have deemed relevant to such imposition, *ibid.*[10] The statute explicitly directs the procedure controlling this jury deliberation:

> "If there is a unanimous finding by the jury that one or more of the factors [enumerated in aggravation] exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." ¶ 9–1(g).

In accord with this statutory procedure, the trial judge in this case instructed the jury:

> "In deciding whether the Defendant should be sentenced to death, you should consider all the aggravating

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[10] Illinois Rev. Stat., ch. 38, ¶ 9–1(c) (Supp. 1990), provides:

"Mitigating factors may include but need not be limited to the following:

"(1) the defendant has no significant history of prior criminal activity;

"(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

"(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

"(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

"(5) the defendant was not personally present during commission of the act or acts causing death."

> factors supported by the evidence and all the mitigating factors supported by the evidence.
>
> . . . . .
>
> "If you unanimously find, from your consideration of all the evidence, that there are no mitigating factors sufficient to preclude imposition of the death sentence, then you should sign the verdict requiring the Court sentence the Defendant to death." App. 122–123.

Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty. Any contrary reading of this instruction, or more importantly, the controlling statute, renders the term "sufficient" meaningless. The statute plainly indicates that a lesser sentence is available in every case where mitigating evidence exists; thus any juror who would invariably impose the death penalty upon conviction cannot be said to have reached this decision based on all the evidence. While JUSTICE SCALIA chooses to argue that such a "merciless juro[r]" is not a "lawless" one, *post*, at 751, he is in error, for such a juror will not give mitigating evidence the consideration that the statute contemplates. Indeed, the Illinois Supreme Court recognizes that jurors are not impartial if they would automatically vote for the death penalty, and that questioning in the manner petitioner requests is a direct and helpful means of protecting a defendant's right to an impartial jury. See n. 3, *supra*. The State has not suggested otherwise in this Court.

Surely if in a particular Illinois case the judge, who imposes sentence should the defendant waive his right to jury sentencing under the statute, see n. 1, *supra*, was to announce that, to him or her, mitigating evidence is beside the point and that he or she intends to impose the death penalty without regard to the nature or extent of mitigating evidence

if the defendant is found guilty of a capital offense, that judge is refusing in advance to follow the statutory direction to consider that evidence and should disqualify himself or herself. Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial. Accordingly, the defendant in this case was entitled to have the inquiry made that he proposed to the trial judge.

IV

Because the "inadequacy of *voir dire*" leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand.[11] *Turner* v. *Murray*, 476 U. S., at 37. Accordingly, the judgment of the Illinois Supreme Court affirming petitioner's death sentence is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today holds that a juror who will always impose the death penalty for capital murder is not "impartial" in the sense required by the Sixth Amendment; that the Constitution requires that *voir dire* directed to this specific "bias" be provided upon the defendant's request; and that the more general questions about "fairness" and ability to "follow the law" that were asked during *voir dire* in this case were inadequate. Because these conclusions seem to me jointly and severally wrong, I dissent.

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[11] Our decision today has no bearing on the validity of petitioner's conviction. *Witherspoon*, 391 U. S., at 523, n. 21.

I

The Court today reaffirms our oft-repeated holding that the Sixth Amendment (which is binding on the States through the Fourteenth Amendment) does not require a jury trial at the sentencing phase of a capital case. *Ante*, at 726. See *Clemons* v. *Mississippi*, 494 U. S. 738, 745–746 (1990); *Walton* v. *Arizona*, 497 U. S. 639, 647–649 (1990); *Cabana* v. *Bullock*, 474 U. S. 376, 385 (1986); *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984); see also *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986) (no right to jury sentencing in noncapital case). In a separate line of cases, however, we have said that the exclusion of persons who merely "express serious reservations about capital punishment" from sentencing juries violates the right to an "*impartial* jury" under the *Sixth Amendment*. *Witherspoon* v. *Illinois*, 391 U. S. 510, 518 (1968); see also *Adams* v. *Texas*, 448 U. S. 38, 40 (1980); *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985). The two propositions are, of course, contradictory: If capital sentencing is not subject to the Sixth Amendment jury guarantee, then neither is it subject to the subsidiary requirement that the requisite jury be impartial.

The Court effectively concedes that the Sixth Amendment does not apply here, relying instead upon the Due Process Clause of the Fourteenth Amendment, which it says requires that any sentencing jury be "impartial" *to the same extent* that the Sixth Amendment requires a jury at the guilt phase to be impartial. *Ante*, at 727. I agree with that. See *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion) (sentencing procedures must comply with the requirements of the Due Process Clause). I do not agree, however, that unconstitutional "partiality," for either Sixth Amendment or Fourteenth Amendment purposes, is established by the fact that a juror's standard of judgment—which he applies to the defendant on trial as he would to all others—happens to be the standard least favorable to the defense. Assume, for example, a criminal prosecution in which the

State plans to prove only elements of circumstantial evidence *x*, *y*, and *z*. Surely counsel for the defendant cannot establish unconstitutional partiality (and hence obtain mandatory recusal) of a juror by getting him to state, on *voir dire*, that if, in a prosecution for this crime, elements *x*, *y*, and *z* were shown, he would always vote to convict. Such an admission would simply demonstrate that particular juror's standard of judgment regarding how evidence deserves to be weighed—and even though application of that standard will, of a certainty, cause the juror to vote to convict in the case at hand, the juror is not therefore "biased" or "partial" in the constitutionally forbidden sense. So also, it seems to me, with jurors' standards of judgment concerning appropriateness of the death penalty. The fact that a particular juror thinks the death penalty proper *whenever* capital murder is established does not disqualify him. To be sure, the law governing sentencing verdicts says that a jury *may* give less than the death penalty in such circumstances, just as, in the hypothetical case I have propounded, the law governing guilt verdicts says that a jury *may* acquit despite proof of elements *x*, *y*, and *z*. But in neither case does the requirement that a more defense-favorable option be left available to the jury convert into a requirement that all jurors must, on the facts of the case, be amenable to entertaining that option.

A State in which the jury does the sentencing no more violates the due process requirement of impartiality by allowing the seating of jurors who favor the death penalty than does a State with judge-imposed sentencing by permitting the people to elect (or the executive to appoint) judges who favor the death penalty. Cf. *United States* v. *Grinnell Corp.*, 384 U. S. 563, 583 (1966); *United States* v. *Richards*, 737 F. 2d 1307, 1311 (CA4 1984), cert. denied, 469 U. S. 1106 (1985); *United States* v. *Thompson*, 483 F. 2d 527, 530–531 (CA3 1973) (Adams, J., dissenting); 2 W. LaFave & J. Israel, Criminal Procedure §21.4(b), p. 747 (1984) (adherence to a particular legal principle is not a basis for challenging impar-

tiality of a judge). Indeed, it is precisely because such individual juror "biases" *are* constitutionally permissible that *Witherspoon* v. *Illinois* imposed the limitation that a State may not skew the makeup of the jury *as a whole* by excluding all death-scrupled jurors. 391 U. S., at 519–523.

II

In the Court's view, a juror who will always impose the death penalty upon proof of the required aggravating factors[1] "will fail in good faith to consider the evidence of aggravating and mitigating circumstances *as the instructions require him to do.*" *Ante*, at 729 (emphasis added); see also *ante*, at 738–739. I would agree with that if it were true that the instructions required jurors to deem certain evidence to be "mitigating" and to weigh that evidence in deciding the penalty. On that hypothesis, the juror's firm attachment to the death penalty would demonstrate an absence of the constitutionally requisite impartiality, which requires that the decisionmaker be able "conscientiously [to] apply the law and find the facts." *Witt*, *supra*, at 423; see also *Lockhart* v. *McCree*, 476 U. S. 162, 178 (1986); *Adams*, *supra*, at 45. The hypothesis, however, is not true as applied to the facts of the present case. Remarkably, the Court rests its

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[1] It is important to bear in mind that the juror who will ignore the requirement of finding an aggravating factor is not at issue here. Petitioner does not contend that the *voir dire* question he seeks is necessary because the death-inclined juror will not impartially make the strictly factual determination, at the first stage of Illinois' two-part sentencing procedure, that the defendant is *eligible* for the death penalty because one of the statutorily required aggravating factors exists (in this case, the fact that the murder was a contract killing). Obviously, the standard question whether the juror can obey the court's instructions is enough to disclose that difficulty. Petitioner's theory—which the Court accepts, *ante*, at 735–736—is that the special *voir dire* question is necessary to identify those veniremen who, at the second, weighing stage, after having properly found the aggravating factor, "will never find enough mitigation to preclude imposing death." Brief for Petitioner 8.

judgment upon a juror's inability to comply with instructions, *without bothering to describe the key instructions.* When one considers them, it is perfectly clear that they do not preclude a juror from taking the view that, for capital murder, a death sentence is always warranted.

The jury in this case was instructed that "[a]ggravating factors are reasons why the Defendant should be sentenced to death"; that "[m]itigating factors are reasons why the Defendant should not be sentenced to death"; that the jury must "consider all the aggravating factors supported by the evidence and all the mitigating factors supported by the evidence"; and that the jury should impose a death sentence if it found, "from [its] consideration of all the evidence, that there are no mitigating factors sufficient to preclude imposition of a death sentence," App. 122–123.[2] The instructions did not in any way further define what constitutes a "mitigating" or an "aggravating" factor, other than to point out that the jury's finding, at the death-eligibility stage, that petitioner committed a contract killing was necessarily an aggravator. As reflected in these instructions, Illinois law permitted each juror to define for himself whether a particular item of evidence was mitigating, in the sense that it provided a "reaso[n] why the Defendant should not be sentenced to death." Thus, it is simply not the case that Illinois law precluded a juror from taking the bright-line position that there are no valid reasons why a defendant who has committed a contract killing should not be sentenced to death. Such a juror does not "fail . . . to consider the evidence," *ante,* at

[2] The Court attaches great weight to the use of the term "sufficient" in these instructions and in the governing statute. The Court views this term as implicitly establishing that the jurors *must* find some mitigation. (How else, the Court reasons, could the jury determine whether there is "sufficient" mitigation?) *Ante,* at 738. The inference is plainly fallacious: A direction to a person to consider whether there are "sufficient" reasons to do something does not logically imply that in *some* circumstance he *must* find something to be a "reason," and must find that reason to be "sufficient."

729; cf. Ill. Rev. Stat., ch. 38, ¶ 9–1(c) (Supp. 1990) ("The court . . . shall instruct the jury to consider any aggravating and any mitigating factors which are relevant . . ."); he simply fails to give it the effect the defendant desires.[3]

Nor can the Court's exclusion of these death-inclined jurors be justified on the theory that—regardless of what Illinois law purports to permit—the *Eighth Amendment* prohibits a juror from always advocating a death sentence at the weighing stage. Our cases in this area hold, not that the sentencer *must give effect to* (or even that he *must consider*) the evidence offered by the defendant as mitigating, but rather that he must "not be *precluded* from considering" it, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) (emphasis added); *Bell* v. *Ohio*, 438 U. S. 637, 642 (1978) (plurality opinion) (same). See also *Walton*, 497 U. S., at 652 (plurality opinion) ("'[T]he requirement of individualized sentencing in capital cases is satisfied by *allowing* the jury to

[3] The Court notes that the Illinois statute lists certain potentially mitigating factors, see Ill. Rev. Stat., ch. 38, ¶ 9–1(c) (Supp. 1990), and therefore concludes that the legislature "must have deemed [them] relevant" to the imposition of the death penalty. *Ante*, at 737. It is of course true that the listed factors are "relevant" in the sense that a juror "may" find them to be mitigating, ¶ 9–1(c), and also in the sense that the defendant must be allowed to introduce evidence concerning these factors. But the statute's permissive and nonexhaustive list clearly does not establish what the Court needs to show, viz., that jurors *must* deem these (or some other factors) to be actually "mitigating." The fact that the jury has the discretion to deem evidence to be mitigating cannot establish that there is an obligation to do so. Indeed, it is impossible in principle to distinguish between a juror who does not believe that *any* factor can be mitigating from one who believes that a *particular* factor—*e. g.*, "extreme mental or emotional disturbance," ¶ 9–1(c)(2)—is not mitigating. (Presumably, under today's decision a juror who thinks a "bad childhood" is never mitigating must also be excluded.) In any event, in deciding whether to vacate petitioner's sentence on account of juror impartiality—*i. e.*, on the basis that one or more of petitioner's jurors may have refused to follow the instructions—we must be guided, not by the instructions that (perhaps) *should* have been given (a question of state law which we have no authority to review), but by the instructions that *were* given.

consider all relevant mitigating evidence' ") (emphasis added) (quoting *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307 (1990)); *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990) ("[T]he State cannot *bar* relevant mitigating evidence") (emphasis added); *McKoy* v. *North Carolina*, 494 U. S. 433, 442–443 (1990) ("[E]ach juror [must] be *permitted* to consider and give effect to mitigating evidence") (emphasis added); *Penry* v. *Lynaugh*, 492 U. S. 302, 318 (1989) (a State may not "*prevent* the sentencer from considering and giving effect to [mitigating] evidence") (emphasis added); *id.*, at 328 (jury must be "*provided with a vehicle* for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision") (emphasis added); *Mills* v. *Maryland*, 486 U. S. 367, 375 (1988) (State may not impose any "*barrier* to the sentencer's consideration of all mitigating evidence") (emphasis added); *Turner* v. *Murray*, 476 U. S. 28, 34 (1986) (plurality opinion) (sentencer "*must be free* to weigh relevant mitigating evidence") (emphasis added); *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977) (mandatory death penalty statute is unconstitutional because it "does not *allow* for consideration of particularized mitigating factors") (emphasis added); *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion) (same); *Jurek* v. *Texas*, 428 U. S. 262, 271 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) ("A jury must be *allowed* to consider . . . all relevant [mitigating] evidence") (emphasis added). Similarly, where the judge is the final sentencer we have held, not that he *must* consider mitigating evidence, but only that he may not, on *legal* grounds, refuse to consider it, *Hitchcock* v. *Dugger*, 481 U. S. 393, 394, 398–399 (1987); *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114 (1982) (a sentencing judge may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence") (emphasis in original). *Woodson* and *Lockett* meant to ensure that the sentencing jury would function as a "link between contemporary community values and the penal system," *Witherspoon*, 391 U. S., at 519, n. 15; they did *not* mean to specify what the *content* of those values

must be.[4] The "conscience of the community," *id.*, at 519, also includes those jurors who are not swayed by mitigating evidence.

The Court relies upon dicta contained in our opinion in *Ross* v. *Oklahoma*, 487 U. S. 81 (1988). *Ante*, at 728–729. In that case, the defendant challenged for cause a juror who stated during *voir dire* that he would automatically vote to impose a death sentence if the defendant were convicted. The trial court rejected the challenge, and Ross used a peremptory challenge to remove the juror. Although we noted that the state appellate court had assumed that such a juror would not be able to follow the law, 487 U. S., at 84–85 (citing *Ross* v. *State*, 717 P. 2d 117, 120 (Okla. Crim. App. 1986)), we held that Ross was not deprived of an impartial jury because none of the jurors who actually sat on the petit jury was partial. 487 U. S., at 86–88. In reaching that conclusion, however, we expressed the view that had the challenged juror actually served, "the sentence would have to be overturned." *Id.*, at 85. The Court attaches great weight to this dictum, which it describes as "announc[ing] our considered view," *ante*, at 728. This is hyperbole. It is clear on the face of the opinion that the dictum was based entirely on the fact that the state court had assumed that such a juror was unwilling to follow the law at the penalty phase—a point we did not purport to examine independently. 487 U. S., at 84–85. The *Ross* dictum thus merely reflects the quite modest proposition that a juror who will not follow the law is not impartial.

Because Illinois would not violate due process by seating a juror who will not be swayed by mitigating evidence at the weighing stage, the Constitution does not entitle petitioner to identify such jurors during *voir dire*.

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[4] The Court's only response to this point is the suggestion that it somehow rests upon my rejecting the *Woodson-Lockett* line of cases. *Ante*, at 736. That is not so, as my quotations from over a dozen *Woodson-Lockett* cases make painfully clear.

III

Even if I agreed with the Court, however, that jurors who will always advocate a death sentence for capital murder are not "impartial" and must be excused for cause, I would not agree with the further conclusion that the Constitution requires a trial court to make specific inquiries on this subject during *voir dire*.

In *Mu'Min* v. *Virginia*, 500 U. S. 415 (1991), we surveyed our cases concerning the requirements of *voir dire* and concluded that, except where interracial capital crimes are at issue, trial courts "retai[n] great latitude in deciding what questions should be asked on *voir dire*," *id.*, at 424; see also *Ristaino* v. *Ross*, 424 U. S. 589, 594 (1976). We emphasized that our authority to require specific inquiries on *voir dire* is particularly narrow with respect to state-court trials, where we may not exercise supervisory authority and are "limited to enforcing the commands of the United States Constitution," *Mu'Min*, 500 U. S., at 422. We concluded, as a general matter, that a defendant was entitled to specific questions only if the failure to ask them would render his trial "fundamentally unfair," *id.*, at 426. Thus, we have held that absent some "special circumstance," *Turner*, *supra*, at 37, a "generalized but thorough inquiry into the impartiality of the veniremen" is a constitutionally adequate *voir dire*. *Ristaino*, *supra*, at 598. Finally, we have long acknowledged that, in light of the credibility determinations involved, a trial court's finding that a particular juror is impartial may "be overturned only for 'manifest error,'" *Patton* v. *Yount*, 467 U. S. 1025, 1031 (1984) (quoting *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961)); see also *Mu'Min*, *supra*, at 428.

Were the Court today extending *Witherspoon*'s jury-balancing rule so as to require affirmatively that a capital sentencing jury contain a mix of views on the death penalty, that requirement would of course constitute a "special circumstance" necessitating specific inquiry into the subject on *voir dire*. But that is not what petitioner has sought, and it

is not what the Court purports to decree. Its theory, as I have described, is that a juror who will always impose the death penalty for capital murder is one who "will fail in good faith to consider the evidence of aggravating and mitigating circumstances *as the instructions require him to do*," *ante*, at 729 (emphasis added). Even assuming (contrary to the reality) that that theory fits the facts of this case (*i. e.*, that the instructions required jurors to be open to voting against the death penalty on the basis of allegedly mitigating circumstances), I see no reason why jurors who will defy this element of the instructions, like jurors who will defy other elements of the instructions, see, *e. g.*, n. 1, *supra*, cannot be identified by more general questions concerning fairness and willingness to follow the law. In the present case, the trial court on *voir dire* specifically asked nine of the jurors who ultimately served whether they would follow the court's instructions even if they disagreed with them, and all nine answered affirmatively. Moreover, all the veniremen were informed of the nature of the case and were instructed that, if selected, they would be required to follow the court's instructions; subsequently, all 12 jurors responded negatively to a specific question whether there was any reason why they did not think they could be fair and impartial in this case. These questions, which were part of an extensive *voir dire*, succeeded in identifying one juror who would be unable to follow the court's instructions at the penalty phase: The juror admitted that, because of the anger he felt over the murder of his friend's parents, his sentiments in favor of the death penalty were so strong that he did not believe he could be fair to petitioner at the sentencing hearing. Taking appropriate account of the opportunity for the trial court to observe and evaluate the demeanor of the veniremen, I see no basis for concluding that its finding that the 12 jurors were impartial was manifestly erroneous.

The Court provides two reasons why a specific question must be asked, but neither passes the most gullible scrutiny.

First, the Court states that general questions would be insufficient because "such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial . . . ." *Ante*, at 735. In other words, jurors who would always impose the death penalty would be violating the instructions without realizing that that is what they are doing. It seems to me quite obvious that solution of this problem does not require a specific question of each juror, but can be achieved by simply changing the instructions so that these well-intentioned jurors will understand that an aggravators-always-outweigh-mitigators view is prohibited. The record does not reflect that petitioner made any objection to the clarity of the instructions in this regard.

Second, the Court asserts that the adequacy of general *voir dire* questions is belied by "[t]he State's own request for questioning under *Witherspoon* and *Witt*." *Ante*, at 734. Without such questioning, we are told, "*Witherspoon* and its succeeding cases would be in large measure superfluous." *Ibid.* But *Witherspoon* did *not*, as this reasoning assumes, give the State a right to exclude jurors ("[I]t is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective juror," *Adams*, 448 U. S., at 47–48), and it is therefore quite impossible that anything we say on that subject today could render the holding of *Witherspoon* "superfluous." What the Court describes, *ante*, at 733, as a "very short step" from *Witherspoon*, *Adams*, and *Witt*, is in fact a great leap over an unbridgeable chasm of logic. *Witherspoon* and succeeding cases held that the State was not constitutionally *prevented* from excluding jurors who would on no facts impose death; from which the Court today concludes that a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death. The Court's argument that because the Constitution requires one it must re-

quire the other obviously rests on a false premise.[5] In any event, the mere fact that Illinois sees fit to request one or another question on *voir dire* in order to discover one-result-only jurors cannot, as a logical matter, establish that more general questioning is *constitutionally inadequate* to do the job.

For similar reasons, I reject petitioner's argument that it is "fundamentally unfair" to allow Illinois to make specific inquiries concerning those jurors who will always vote against the death penalty but to preclude the defendant from discovering (and excluding) those jurors who will always vote in favor of death. Brief for Petitioner 14 (citing *Wardius* v. *Oregon*, 412 U. S. 470 (1973)). Even if it were unfair, of course, the State should be given the option, which today's opinion does not provide, of abandoning the *Witherspoon* qualification. (Where the death penalty statute does not contain a unanimity requirement, I am confident prosecutors would prefer that to the wholesale elimination of jurors favoring the death penalty that will be the consequence of today's decision.) But in fact there is no unfairness in the asymmetry. By reason of Illinois' death penalty unanimity requirement, Ill. Rev. Stat., ch. 38, ¶ 9–1(g) (Supp. 1990), the practical consequences of allowing the two types of jurors to serve are vastly different: A single death penalty opponent can block that punishment, but 11 unwavering advocates cannot impose it. And more fundamentally, the asymmetry is not unfair because, under Illinois law as reflected in the

[5] If, as the Court claims, this case truly involved "the reverse" of the principles established in *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and the cases following it, *ante*, at 731, then it is difficult to understand why petitioner would not be entitled to challenge, not just those jurors who will "automatically" impose the death penalty, but also those whose sentiments on the subject are sufficiently strong that their faithful service as jurors will be "*substantially impaired*"—the reformulated standard we adopted in *Adams* v. *Texas*, 448 U. S. 38 (1980), and *Wainwright* v. *Witt*, 469 U. S. 412 (1985). The Court's failure to carry its premise to its logical conclusion suggests its awareness that the premise is wrong.

statute and instructions in this case, the *Witherspoon*-disqualified juror is a lawless juror, whereas the juror to be disqualified under the Court's new rule is not. In the first stage of Illinois' two-part sentencing hearing, jurors *must* determine, on the facts, specified aggravating factors, and at the second, weighing stage, they *must* impose the death penalty for murder with particular aggravators if they find "no mitigating factors sufficient to preclude [its] imposition." But whereas the finding of aggravation is mandatory, the finding of mitigation is optional; what constitutes mitigation is not defined and is left up to the judgment of each juror. Given that there will *always* be aggravators to be considered at the weighing stage, the juror who says he will never vote for the death penalty, no matter what the facts, is saying that he will not apply the law (the classic case of partiality)—since the facts may show no mitigation. But the juror who says that he will always vote for the death penalty is *not* promising to be lawless, since there is no case in which he is by law *compelled* to find a mitigating fact "sufficiently mitigating." The people of Illinois have decided, in other words, that murder with certain aggravators will be punished by death, unless the jury chooses to extend mercy. That scheme complies with our (ever-expanding) death penalty jurisprudence as it existed yesterday. The Court has, in effect, now added the *new* rule that no merciless jurors can sit.

* * *

Sixteen years ago, this Court decreed—by a sheer act of will, with no pretense of foundation in constitutional text or American tradition—that the People (as in We, the People) cannot decree the death penalty, absolutely and categorically, for *any* criminal act, even (presumably) genocide; the jury must always be given the option of extending mercy. *Woodson*, 428 U. S., at 303–305. Today, obscured within the fog of confusion that is our annually improvised Eighth Amendment, "death is different" jurisprudence, the Court strikes a

further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment. Those who agree with the author of Exodus, or with Immanuel Kant,[6] must be banished from American juries—not because the People have so decreed, but because such jurors do not share the strong penological preferences of this Court. In my view, that not only is not required by the Constitution of the United States; it grossly offends it.

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[6] See Exodus 21:12 ("He that smiteth a man, so that he die, shall be surely put to death"); I. Kant, The Philosophy of Law 198 [1796] (W. Hastie transl. 1887) ("[W]hoever has committed Murder, must *die*. . . . Even if a Civil Society resolved to dissolve itself with the consent of all its members[,] . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds . . .").

Syllabus

PATTERSON, TRUSTEE *v.* SHUMATE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91–913. Argued April 20, 1992—Decided June 15, 1992

Respondent Shumate was a participant in his employer's pension plan, which contained the antialienation provision required for tax qualification under the Employee Retirement Income Security Act of 1974 (ERISA). The District Court rejected his contention that his interest in the plan should be excluded from his bankruptcy estate under § 541(c)(2) of the Bankruptcy Code, which excludes property of the debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law." The court held, *inter alia*, that the latter phrase embraces only state law, not federal law such as ERISA, and that Shumate's interest in the plan did not qualify for protection as a spendthrift trust under state law. The court ordered that Shumate's interest in the plan be paid over to petitioner, as trustee of Shumate's bankruptcy estate. The Court of Appeals reversed, ruling that the interest should be excluded from the bankruptcy estate under § 541(c)(2).

Held: The plain language of the Bankruptcy Code and ERISA establishes that an antialienation provision in a qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of § 541(c)(2). Pp. 757–766.

(a) Plainly read, § 541(c)(2) encompasses any relevant nonbankruptcy law, including federal law such as ERISA. The section contains no limitation on "applicable nonbankruptcy law" relating to the source of the law, and its text nowhere suggests that that phrase refers, as petitioner contends, exclusively to *state* law. Other sections in the Bankruptcy Code reveal that Congress knew how to restrict the scope of applicable law to "state law" and did so with some frequency. Its use of the broader phrase "applicable nonbankruptcy law" strongly suggests that it did not intend to restrict § 541(c)(2) in the manner petitioner contends. Pp. 757–759.

(b) The antialienation provision contained in this ERISA-qualified plan satisfies the literal terms of § 541(c)(2). The sections of ERISA and the Internal Revenue Code requiring a plan to provide that benefits may not be assigned or alienated clearly impose a "restriction on the transfer" of a debtor's "beneficial interest" within § 541(c)(2)'s meaning, and the terms of the plan provision in question comply with those requirements. Moreover, the transfer restrictions are "enforceable," as

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required by § 541(c)(2), since ERISA gives participants the right to sue to enjoin acts that violate that statute or the plan's terms. Pp. 759–760.

(c) Given the clarity of the statutory text, petitioner bears an "exceptionally heavy" burden of persuasion that Congress intended to limit the § 541(c)(2) exclusion to restrictions on transfer that are enforceable only under state spendthrift trust law. *Union Bank* v. *Wolas*, 502 U. S. 151, 155–156. He has not satisfied that burden, since his several challenges to the Court's interpretation of § 541(c)(2)—that it is refuted by contemporaneous legislative materials, that it renders superfluous the § 522(d)(10)(E) debtor's exemption for pension payments, and that it frustrates the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate—are unpersuasive. Pp. 760–765.

943 F. 2d 362, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, *post*, p. 766.

G. Steven Agee argued the cause and filed briefs for petitioner.

Kevin R. Huennekens argued the cause for respondent. With him on the brief were *Robert A. Lefkowitz* and *Daniel A. Gecker.*

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Bruton, Deputy Solicitor General Mahoney, Gary D. Gray,* and *Bridget M. Rowan.**

**David B. Tatge, pro se,* filed a brief of *amicus curiae* urging reversal. With him on the brief was *Dwight D. Meier.*

Briefs of *amici curiae* urging affirmance were filed for the American Society of Pension Actuaries by *David R. Levin;* for the Chamber of Commerce of the United States of America by *Stephen A. Bokat, Robin S. Conrad,* and *Mona C. Zeiberg;* for the ERISA Industry Committee et al. by *John M. Vine* and *Thomas M. Christina;* for Hallmark Cards, Inc., by *M. Theresa Hupp, David C. Trowbridge,* and *James B. Overman;* for Lincoln National Corporation by *Brian J. Martin;* for Wal-Mart Stores, Inc., et al. by *Phillip R. Garrison;* and for Ronald J. Wyles et al. by *David H. Adams.*

Briefs of *amici curiae* were filed for the American College of Trust and Estate Counsel by *Alvin J. Golden* and *C. Wells Hall III;* and for Eldon S. Reed by *Cathy L. Reece* and *Gary H. Ashby.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The Bankruptcy Code excludes from the bankruptcy estate property of the debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law." 11 U. S. C. § 541(c)(2). We must decide in this case whether an antialienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law," and whether, accordingly, a debtor may exclude his interest in such a plan from the property of the bankruptcy estate.

I

Respondent Joseph B. Shumate, Jr., was employed for over 30 years by Coleman Furniture Corporation, where he ultimately attained the position of president and chairman of the board of directors. Shumate and approximately 400 other employees were participants in the Coleman Furniture Corporation Pension Plan (Plan). The Plan satisfied all applicable requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and qualified for favorable tax treatment under the Internal Revenue Code. In particular, Article 16.1 of the Plan contained the antialienation provision required for qualification under § 206(d)(1) of ERISA, 29 U. S. C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated"). App. 342. Shumate's interest in the Plan was valued at $250,000. *Id.*, at 93–94.

In 1982, Coleman Furniture filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code. The case was converted to a Chapter 7 proceeding, and a trustee, Roy V. Creasy, was appointed. Shumate himself encountered financial difficulties and filed a petition for bankruptcy in 1984. His case, too, was converted to a Chapter 7 proceeding, and petitioner John R. Patterson was appointed trustee.

Creasy terminated and liquidated the Plan, providing full distributions to all participants except Shumate. Patterson

then filed an adversary proceeding against Creasy in the Bankruptcy Court for the Western District of Virginia to recover Shumate's interest in the Plan for the benefit of Shumate's bankruptcy estate. Shumate in turn asked the United States District Court for the Western District of Virginia, which already had jurisdiction over a related proceeding, to compel Creasy to pay Shumate's interest in the Plan directly to him. The bankruptcy proceeding subsequently was consolidated with the District Court action. App. to Pet. for Cert. 53a–54a.

The District Court rejected Shumate's contention that his interest in the Plan should be excluded from his bankruptcy estate. The court held that § 541(c)(2)'s reference to "nonbankruptcy law" embraced only state law, not federal law such as ERISA. *Creasy* v. *Coleman Furniture Corp.*, 83 B. R. 404, 406 (1988). Applying Virginia law, the court held that Shumate's interest in the Plan did not qualify for protection as a spendthrift trust. *Id.*, at 406–409. The District Court also rejected Shumate's alternative argument that even if his interest in the Plan could not be excluded from the bankruptcy estate under § 541(c)(2), he was entitled to an exemption under 11 U. S. C. § 522(b)(2)(A), which allows a debtor to exempt from property of the estate "any property that is exempt under Federal law." 83 B. R., at 409–410. The District Court ordered Creasy to pay Shumate's interest in the Plan over to his bankruptcy estate. App. to Pet. for Cert. 54a–55a.

The Court of Appeals for the Fourth Circuit reversed. 943 F. 2d 362 (1991). The court relied on its earlier decision in *In re Moore*, 907 F. 2d 1476 (1990), in which another Fourth Circuit panel was described as holding, subsequent to the District Court's decision in the instant case, that "ERISA-qualified plans, which by definition have a nonalienation provision, constitute 'applicable nonbankruptcy law' and contain enforceable restrictions on the transfer of pension interests." 943 F. 2d, at 365. Thus, the Court of

Appeals held that Shumate's interest in the Plan should be excluded from the bankruptcy estate under § 541(c)(2). *Ibid.* The court then declined to consider Shumate's alternative argument that his interest in the Plan qualified for exemption under § 522(b). *Id.*, at 365–366.

We granted certiorari, 502 U. S. 1057 (1992), to resolve the conflict among the Courts of Appeals as to whether an antialienation provision in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" for purposes of the § 541(c)(2) exclusion of property from the debtor's bankruptcy estate.[1]

II

A

In our view, the plain language of the Bankruptcy Code and ERISA is our determinant. See *Toibb* v. *Radloff*, 501 U. S. 157, 160 (1991). Section 541(c)(2) provides the following exclusion from the otherwise broad definition of "property of the estate" contained in § 541(a)(1) of the Code:

> "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under this title." (Emphasis added.)

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[1] Compare *In re Harline*, 950 F. 2d 669 (CA10 1991) (ERISA antialienation provision constitutes "applicable nonbankruptcy law"), cert. pending, No. 91–1412; *Velis* v. *Kardanis*, 949 F. 2d 78 (CA3 1991) (same); *Shumate* v. *Patterson*, 943 F. 2d 362 (CA4 1991) (this case; same); *In re Lucas*, 924 F. 2d 597 (CA6) (same), cert. denied *sub nom. Forbes* v. *Holiday Corp. Savings and Retirement Plan*, 500 U. S. 959 (1991); and *In re Moore*, 907 F. 2d 1476 (CA4 1990) (same), with *In re Dyke*, 943 F. 2d 1435 (CA5 1991) (ERISA antialienation provision does not constitute "applicable nonbankruptcy law"); *In re Daniel*, 771 F. 2d 1352 (CA9 1985) (same), cert. denied, 475 U. S. 1016 (1986); *In re Lichstrahl*, 750 F. 2d 1488 (CA11 1985) (same); *In re Graham*, 726 F. 2d 1268 (CA8 1984) (same); and *In re Goff*, 706 F. 2d 574 (CA5 1983) (same).

The natural reading of the provision entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Nothing in § 541 suggests that the phrase "applicable nonbankruptcy law" refers, as petitioner contends, exclusively to *state* law. The text contains no limitation on "applicable nonbankruptcy law" relating to the source of the law.

Reading the term "applicable nonbankruptcy law" in § 541(c)(2) to include federal as well as state law comports with other references in the Bankruptcy Code to sources of law. The Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to "state law" and did so with some frequency. See, *e. g.*, 11 U. S. C. § 109(c)(2) (entity may be a debtor under chapter 9 if authorized "by State law"); § 522(b)(1) (election of exemptions controlled by "the State law that is applicable to the debtor"); § 523(a)(5) (a debt for alimony, maintenance, or support determined "in accordance with State or territorial law" is not dischargeable); § 903(1) ("[A] State law prescribing a method of composition of indebtedness" of municipalities is not binding on nonconsenting creditors); see also §§ 362(b)(12) and 1145(a). Congress' decision to use the broader phrase "applicable nonbankruptcy law" in § 541(c)(2) strongly suggests that it did not intend to restrict the provision in the manner that petitioner contends.[2]

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[2] The phrase "applicable nonbankruptcy law" appears elsewhere in the Code, and courts have construed those references to include federal law. See, *e. g.*, 11 U. S. C. § 1125(d) (adequacy of disclosure statement not governed by any "otherwise applicable nonbankruptcy law"); *In re Stanley Hotel, Inc.*, 13 B. R. 926, 931 (Bkrtcy. Ct. Colo. 1981) (§ 1125(d) includes federal securities law); 11 U. S. C. § 108(a) (referring to statute of limitations fixed by "applicable nonbankruptcy law"); *In re Ahead By a Length, Inc.*, 100 B. R. 157, 162–163 (Bkrtcy. Ct. SDNY 1989) (§ 108(a) includes Racketeer Influenced and Corrupt Organizations Act); *Motor Carrier Audit & Collection Co.* v. *Lighting Products, Inc.*, 113 B. R. 424, 425–426 (ND Ill. 1989) (§ 108(a) includes Interstate Commerce Act); 11 U. S. C.

The text of § 541(c)(2) does not support petitioner's contention that "applicable nonbankruptcy law" is limited to state law. Plainly read, the provision encompasses any relevant nonbankruptcy law, including federal law such as ERISA. We must enforce the statute according to its terms. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989).

B

Having concluded that "applicable nonbankruptcy law" is not limited to state law, we next determine whether the anti-alienation provision contained in the ERISA-qualified Plan at issue here satisfies the literal terms of § 541(c)(2).

Section 206(d)(1) of ERISA, which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," 29 U. S. C. § 1056(d)(1), clearly imposes a "restriction on the transfer" of a debtor's "beneficial interest" in the trust. The coordinate section of the Internal Revenue Code, 26 U. S. C. § 401(a)(13), states as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated," and thus contains similar restrictions. See also 26 CFR § 1.401(a)–13(b)(1) (1991).

Coleman Furniture's pension plan complied with these requirements. Article 16.1 of the Plan specifically stated: "No benefit, right or interest" of any participant "shall be subject

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§ 108(b) (referring to time for filing pleadings, notices, etc., fixed by "applicable nonbankruptcy law"); *Eagle-Picher Industries, Inc.* v. *United States*, 290 U. S. App. D. C. 307, 321–322, 937 F. 2d 625, 639–640 (1991) (§ 108(b) includes Federal Tort Claims Act). Although we express no view on the correctness of these decisions, we note that our construction of § 541(c)(2)'s reference to "applicable nonbankruptcy law" as including federal law accords with prevailing interpretations of that phrase as it appears elsewhere in the Code. See *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U. S. 624, 633 (1983) (recognizing principle "that a word is presumed to have the same meaning in all subsections of the same statute").

to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, seizure, attachment or other legal, equitable or other process." App. 342.

Moreover, these transfer restrictions are "enforceable," as required by § 541(c)(2). Plan trustees or fiduciaries are required under ERISA to discharge their duties "in accordance with the documents and instruments governing the plan." 29 U. S. C. § 1104(a)(1)(D). A plan participant, beneficiary, or fiduciary, or the Secretary of Labor may file a civil action to "enjoin any act or practice" which violates ERISA or the terms of the plan. §§ 1132(a)(3) and (5). Indeed, this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar. See *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 493 U. S. 365 (1990).[3]

The antialienation provision required for ERISA qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of § 541(c)(2)'s exclusion of property from the bankruptcy estate.

III

Petitioner raises several challenges to this conclusion. Given the clarity of the statutory text, however, he bears an "exceptionally heavy" burden of persuading us that Congress intended to limit the § 541(c)(2) exclusion to restrictions on transfer that are enforceable only under state spendthrift trust law. *Union Bank* v. *Wolas*, 502 U. S. 151, 155–156 (1991).

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[3] The Internal Revenue Service at least on occasion has espoused the view that the transfer of a beneficiary's interest in a pension plan to a bankruptcy trustee would disqualify the plan from taking advantage of the preferential tax treatment available under ERISA. See *McLean* v. *Central States, Southeast & Southwest Areas Pension Fund*, 762 F. 2d 1204, 1206 (CA4 1985); see also *In re Moore*, 907 F. 2d, at 1481.

A

Petitioner first contends that contemporaneous legislative materials demonstrate that § 541(c)(2)'s exclusion of property from the bankruptcy estate should not extend to a debtor's interest in an ERISA-qualified pension plan. Although courts "appropriately may refer to a statute's legislative history to resolve statutory ambiguity," *Toibb* v. *Radloff*, 501 U. S., at 162, the clarity of the statutory language at issue in this case obviates the need for any such inquiry. See *ibid.*; *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S., at 241; *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809, n. 3 (1989).[4]

Even were we to consider the legislative materials to which petitioner refers, however, we could discern no "clearly expressed legislative intention" contrary to the result reached above. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). In his brief, petitioner quotes from House and Senate Reports accompanying the Bankruptcy Reform Act of 1978 that purportedly reflect "unmistakable" congressional intent to limit § 541(c)(2)'s exclusion to pension plans that qualify under state law as spendthrift trusts. Brief for Petitioner 38. Those reports contain only the briefest of discussions addressing § 541(c)(2). The House Report states: "Paragraph (2) of subsection (c) . . . preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law." H. R. Rep. No. 95–595, p. 369 (1977); see also S. Rep. No. 95–989, p. 83 (1978) (§ 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust"). A general introductory section to

[4] Those Courts of Appeals that have limited "applicable nonbankruptcy law" to state spendthrift trust law by ignoring the plain language of § 541(c)(2) and relying on isolated excerpts from the legislative history thus have misconceived the appropriate analytical task. See, *e. g.*, *In re Daniel*, 771 F. 2d, at 1359–1360; *In re Lichstrahl*, 750 F. 2d, at 1490; *In re Graham*, 726 F. 2d, at 1271–1272; *In re Goff*, 706 F. 2d, at 581–582.

the House Report contains the additional statement that the new law "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." H. R. Rep. No. 95–595, p. 176. These meager excerpts reflect at best congressional intent to *include* state spendthrift trust law within the meaning of "applicable nonbankruptcy law." By no means do they provide a sufficient basis for concluding, in derogation of the statute's clear language, that Congress intended to *exclude* other state and federal law from the provision's scope.

B

Petitioner next contends that our construction of § 541(c)(2), pursuant to which a debtor may exclude his interest in an ERISA-qualified pension plan from the bankruptcy estate, renders § 522(d)(10)(E) of the Bankruptcy Code superfluous. Brief for Petitioner 24–33. Under § 522(d)(10)(E), a debtor who elects the federal exemptions set forth in § 522(d) may exempt from the bankruptcy estate his right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract . . . , to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." If a debtor's interest in a pension plan could be *excluded* in full from the bankruptcy estate, the argument goes, then there would have been no reason for Congress to create a limited *exemption* for such interests elsewhere in the statute.

Petitioner's surplusage argument fails, however, for the reason that § 522(d)(10)(E) exempts from the bankruptcy estate a much broader category of interests than § 541(c)(2) excludes. For example, pension plans established by governmental entities and churches need not comply with Subchapter I of ERISA, including the antialienation requirement of § 206(d)(1). See 29 U. S. C. §§ 1003(b)(1) and (2); 26 CFR § 1.401(a)–13(a) (1991). So, too, pension plans that

qualify for preferential tax treatment under 26 U. S. C. § 408 (individual retirement accounts) are specifically excepted from ERISA's antialienation requirement. See 29 U. S. C. § 1051(6). Although a debtor's interest in these plans could not be excluded under § 541(c)(2) because the plans lack transfer restrictions enforceable under "applicable nonbankruptcy law," that interest[5] nevertheless could be exempted under § 522(d)(10)(E).[6] Once petitioner concedes that § 522(d)(10)(E)'s exemption applies to more than ERISA-qualified plans containing antialienation provisions, see Tr. of Oral Arg. 10–11; Brief for Petitioner 31, his argument that our reading of § 541(c)(2) renders the exemption provision superfluous must collapse.

C

Finally, petitioner contends that our holding frustrates the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate. See *id.*, at 37; 11 U. S. C. § 541(a)(1) (estate composed of "all legal or equitable interests of the debtor in property as of the commencement of the case"). As an initial matter, we think that petitioner

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[5] We express no opinion on the separate question whether § 522(d)(10)(E) applies only to distributions from a pension plan that a debtor has an immediate and present right to receive, or to the entire undistributed corpus of a pension trust. See, *e. g.*, *In re Harline*, 950 F. 2d, at 675; *Velis* v. *Kardanis*, 949 F. 2d, at 81–82. See also Arnopol, Including Retirement Benefits in a Debtor's Bankruptcy Estate: A Proposal for Harmonizing ERISA and the Bankruptcy Code, 56 Mo. L. Rev. 491, 535–536 (1991).

[6] Even those courts that would have limited § 541(c)(2) to state law acknowledge the breadth of the § 522(d)(10)(E) exemption. See *In re Goff*, 706 F. 2d, at 587 (noting that § 522(d)(10)(E) "reaches a broad array of employment benefits, and exempts both qualified and unqualified pension plans") (footnote omitted); *In re Graham*, 726 F. 2d, at 1272 (observing that "the § 522(d)(10)(E) exemption would apply to non-ERISA plans as well as to qualified ERISA plans"). See also Arnopol, 56 Mo. L. Rev., at 525–526, 552–553; Seiden, Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?, 61 Am. Bankr. L. J. 301, 318 (1987).

mistakes an admittedly broad definition of includable property for a "policy" underlying the Code as a whole. In any event, to the extent that policy considerations are even relevant where the language of the statute is so clear, we believe that our construction of § 541(c)(2) is preferable to the one petitioner urges upon us.

First, our decision today ensures that the treatment of pension benefits will not vary based on the beneficiary's bankruptcy status. See *Butner* v. *United States*, 440 U. S. 48, 55 (1979) (observing that "[u]niform treatment of property interests" prevents "a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy,'" quoting *Lewis* v. *Manufacturers National Bank*, 364 U. S. 603, 609 (1961)). We previously have declined to recognize any exceptions to ERISA's antialienation provision *outside* the bankruptcy context. See *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 493 U. S. 365 (1990) (labor union may not impose constructive trust on pension benefits of union official who breached fiduciary duties and embezzled funds). Declining to recognize any exceptions to that provision *within* the bankruptcy context minimizes the possibility that creditors will engage in strategic manipulation of the bankruptcy laws in order to gain access to otherwise inaccessible funds. See Seiden, Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?, 61 Am. Bankr. L. J. 301, 317 (1987) (noting inconsistency if "a creditor could not reach a debtor-participant's plan right or interest in a garnishment or other collection action outside of a bankruptcy case but indirectly could reach the plan right or interest by filing a petition . . . to place the debtor in bankruptcy involuntarily").

Our holding also gives full and appropriate effect to ERISA's goal of protecting pension benefits. See 29 U. S. C. §§ 1001(b) and (c). This Court has described that goal as one

of ensuring that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 375 (1980). In furtherance of these principles, we recently declined in *Guidry*, notwithstanding strong equitable considerations to the contrary, to recognize an implied exception to ERISA's antialienation provision that would have allowed a labor union to impose a constructive trust on the pension benefits of a corrupt union official. We explained:

> "Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task." 493 U. S., at 376.

These considerations apply with equal, if not greater, force in the present context.

Finally, our holding furthers another important policy underlying ERISA: uniform national treatment of pension benefits. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 9 (1987). Construing "applicable nonbankruptcy law" to include federal law ensures that the security of a debtor's pension benefits will be governed by ERISA, not left to the vagaries of state spendthrift trust law.

IV

In light of our conclusion that a debtor's interest in an ERISA-qualified pension plan may be excluded from the property of the bankruptcy estate pursuant to § 541(c)(2), we need not reach respondent's alternative argument that

his interest in the Plan qualifies for exemption under § 522(b)(2)(A).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring.

The Court's opinion today, which I join, prompts several observations.

When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men."

Speaking of agreed-upon methodology: It is good that the Court's analysis today proceeds on the assumption that use of the phrases "state law" and "applicable nonbankruptcy law" in *other* provisions of the Bankruptcy Code is highly relevant to whether "applicable nonbankruptcy law" means "state law" in § 541(c)(2), since consistency of usage within the same statute is to be presumed. *Ante*, at 758, and n. 2. This application of a normal and obvious principle of statutory construction would not merit comment, except that we explicitly rejected it, in favor of a one-subsection-at-a-time approach, when interpreting another provision of this very statute earlier this Term. See *Dewsnup* v. *Timm*, 502 U. S. 410, 416–417 (1992); *id.*, at 420–423 (SCALIA, J., dissenting). "[W]e express no opinion," our decision said, "as to whether the words [at issue] have different meaning in other provisions of the Bankruptcy Code." *Id.*, at 417, n. 3. I trust

that in our search for a neutral and rational interpretive methodology we have now come to rest, so that the symbol of our profession may remain the scales, not the seesaw.

Syllabus

ALLIED-SIGNAL, INC., AS SUCCESSOR-IN-INTEREST TO BENDIX CORP. *v.* DIRECTOR, DIVISION OF TAXATION

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 91–615. Argued March 4, 1992—Reargued April 22, 1992—Decided June 15, 1992

In order for a State to tax the multistate income of a nondomiciliary corporation, there must be, *inter alia*, a minimal connection between the interstate activities and the taxing State, *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 436–437, and a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business, *id.*, at 437. Rather than isolating the intrastate income-producing activities from the rest of the business, a State may tax a corporation on an apportioned sum of the corporation's multistate business if the business is unitary. *E. g., ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 317. However, a State may not tax the nondomiciliary corporation's income if it is derived from unrelated business activity that constitutes a discrete business enterprise. *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 224. Petitioner is the successor-in-interest to the Bendix Corporation, a Delaware corporation. In the late 1970's Bendix acquired 20.6% of the stock of ASARCO Inc., a New Jersey corporation, and resold it to ASARCO in 1981, generating a $211.5 million gain. After respondent New Jersey tax official assessed Bendix for taxes on an apportioned amount which included in the base the gain realized from the stock disposition, Bendix sued for a refund in State Tax Court. The parties stipulated that, during the period that Bendix held its investment, it and ASARCO were unrelated business enterprises each of whose activities had nothing to do with the other, and that, although Bendix held two seats on ASARCO's board, it exerted no control over ASARCO. Based on this record, the court held that the assessment was proper, and the Appellate Division and the State Supreme Court both affirmed. The latter court stated that the tests for determining a unitary business are not controlled by the relationship between the taxpayer recipient and the affiliate generator of the income that is the subject of the tax, and concluded that Bendix essentially had a business function of corporate acquisitions and divestitures that was an integral operational activity.

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Held:

1. The unitary business principle remains an appropriate device for ascertaining whether a State has transgressed constitutional limitations in taxing a nondomiciliary corporation. Pp. 777–788.

(a) The principle that a State may not tax value earned outside its borders rests on both Due Process and Commerce Clause requirements. The unitary business rule is a recognition of the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income and the necessary limit on the States' authority to tax value or income that cannot fairly be attributed to the taxpayer's activities within a State. The indicia of a unitary business are functional integration, centralization of management, and economies of scale. *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of N. M.*, 458 U. S. 354, 364; *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 179. Pp. 777–783.

(b) New Jersey and several *amici* have not persuaded this Court to depart from the doctrine of *stare decisis* by overruling the cases that announce and follow the unitary business standard. New Jersey's sweeping theory—that all income of a corporation doing any business in a State is, by virtue of common ownership, part of the corporation's unitary business and apportionable—cannot be reconciled with the concept that the Constitution places limits on a State's power to tax value earned outside its borders, and is far removed from the latitude that is granted to States to fashion formulae for apportionment. This Court's precedents are workable in practice. Any divergent results in applying the unitary business principle exist because the variations in the unitary theme are logically consistent with the underlying principles motivating the approach and because the constitutional test is quite fact sensitive. In contrast, New Jersey's proposal would disrupt settled expectations in an area of the law in which the demands of the national economy require stability. Pp. 783–786.

(c) The argument by other *amici* that the constitutional test for determining apportionment should turn on whether the income arises from transactions and activity in the regular course of the taxpayer's trade or business, with such income including income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations, does not benefit the State here. While the payor and payee need not be engaged in the same unitary business, the capital transaction must serve an operational rather than an investment function. *Container Corp.*, *supra*, at 180, n. 19. The existence of a unitary relation between the payor and the payee is but one justification for apportionment. Pp. 786–788.

Syllabus

2. The stipulated factual record in this case makes clear that, under this Court's precedents, New Jersey was not permitted to include the gain realized on the sale of Bendix's ASARCO stock in its apportionable tax base. There is no serious contention that any of the three *Woolworth* factors were present. Functional integration and economies of scale could not exist because, as the parties stipulated, the companies were unrelated business enterprises. Moreover, there was no centralization of management, since Bendix did not own enough ASARCO stock to have the potential to operate ASARCO as an integrated division of a single unitary business and since even potential control is insufficient. *Woolworth, supra,* at 362. Contrary to the State Supreme Court's view, the fact that an intangible asset was acquired pursuant to a long-term corporate strategy of acquisitions and investment does not turn an otherwise passive investment into an integral operational one. See *Container Corp.*, 463 U. S., at 180, n. 19. The fact that a transaction was undertaken for a business purpose does not change its character. Little is revealed about whether ASARCO was run as part of Bendix's unitary business by the fact that Bendix may have intended to use the proceeds of its gain to acquire another company. Nor can it be maintained that Bendix's shares amounted to a short-term investment of working capital analogous to a bank account or a certificate of deposit. See *ibid.* Pp. 788–790.

125 N. J. 20, 592 A. 2d 536, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, STEVENS, SCALIA, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and BLACKMUN and THOMAS, JJ., joined, *post,* p. 790.

Walter Hellerstein reargued the cause for petitioner. With him on the briefs were *Prentiss Willson, Jr., Harry R. Jacobs, Robyn H. Pekala, Andrew L. Frey, Kenneth S. Geller, Charles Rothfeld,* and *Bennett Boskey. Andrew L. Frey* argued the cause for petitioner on the original argument. With him on the briefs were Messrs. Willson, Hellerstein, and Jacobs, *Evan M. Tager,* and Mr. Boskey.

Mary R. Hamill, Deputy Attorney General of New Jersey, reargued the cause for respondent. With her on the briefs

were *Robert J. Del Tufo*, Attorney General, *Joseph L. Yannotti*, Assistant Attorney General, and *Sarah T. Darrow*, Deputy Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed for Coca-Cola Co. et al. by *Mark L. Evans*, *James P. Tuite*, *Alan I. Horowitz*, and *Anthony F. Shelley*; for the Committee on State Taxation by *Amy Eisenstadt*; for General Motors Corp. et al. by *Jerome B. Libin* and *Kathryn L. Moore*; for the Tax Executives Institute, Inc., by *Timothy J. McCormally*; and for Williams Cos., Inc., by *Rose Mary Ham* and *Henry G. Will*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Timothy G. Laddish*, Assistant Attorney General, and *Benjamin F. Miller*, and by the Attorneys General for their respective States as follows: *Charles E. Cole* of Alaska, *Robert A. Butterworth* of Florida, *Larry Echo-Hawk* of Idaho, *Robert T. Stephan* of Kansas, *Michael E. Carpenter* of Maine, *Marc Racicot* of Montana, *John P. Arnold* of New Hampshire, *Nicholas Spaeth* of North Dakota, *Ernest D. Preate, Jr.*, of Pennsylvania, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, and *James E. Doyle* of Wisconsin; for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, and *Thomas A. Barnico*, Assistant Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, *J. Joseph Curran*, Attorney General of Maryland, and *Mary Sue Terry*, Attorney General of Virginia; for the City of New York by *O. Peter Sherwood* and *Edward F. X. Hart*; and for the Multistate Tax Commission by *Alan H. Friedman*, *Paull Mines*, and *Scott D. Smith*.

Briefs of *amici curiae* were filed for the State of Alabama et al. by *Mary Sue Terry*, Attorney General of Virginia, *H. Lane Kneedler*, Chief Deputy Attorney General, *Gail Starling Marshall*, Deputy Attorney General, *Gregory E. Lucyk* and *N. Pendleton Rogers*, Senior Assistant Attorneys General, and *Barbara H. Vann* and *Martha B. Brissette*, Assistant Attorneys General, *Peter W. Low*, *Jimmy Evans*, Attorney General of Alabama, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Gale Norton*, Attorney General of Colorado, *John Payton*, Corporation Counsel of the District of Columbia, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Elizabeth Barrett-Anderson*, Attorney General of Guam, *Warren Price III*, Attorney General of Hawaii, *Linley E. Pearson*, Attorney General of Indiana, *Chris Gorman*, Attorney General of Kentucky, *Richard Ieyoub*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Mike Moore*, Attorney General of Mississippi, *Marc Racicot*, Attorney General of Montana, *Don Stenberg*, Attor-

JUSTICE KENNEDY delivered the opinion of the Court.

Among the limitations the Constitution sets on the power of a single State to tax the multistate income of a nondomiciliary corporation are these: There must be "a 'minimal connection' between the interstate activities and the taxing State," *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 436–437 (1980) (quoting *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978)), and there must be a rational relation between the income attributed to the taxing State and the intrastate value of the corporate business. 445 U. S., at 437. Under our precedents, a State need not attempt to isolate the intrastate income-producing activities from the rest of the business; it may tax an apportioned sum of the corporation's multistate business if the business is unitary. *E. g.*, *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 317

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ney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Tom Udall*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Lee Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *Mark Barnett*, Attorney General of South Dakota, *Dan Morales*, Attorney General of Texas, *Paul Van Dam*, Attorney General of Utah, *Rosalie S. Ballentine*, Attorney General of the Virgin Islands, *Ken Eikenberry*, Attorney General of Washington, *Mario J. Palumbo*, Attorney General of West Virginia, *James E. Doyle*, Attorney General of Wisconsin, and *Joseph B. Meyer*, Attorney General of Wyoming; for the State of Connecticut et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Gerald Langbaum* and *Andrew H. Baida*, Assistant Attorneys General, *Richard Blumenthal*, Attorney General of Connecticut, *Bonnie J. Campbell*, Attorney General of Iowa, *Scott Harshbarger*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, and *James E. O'Neil*, Attorney General of Rhode Island; for American General Corp. by *Roy E. Crawford*, *Russell D. Uzes*, and *Karen A. Bain*; for American Home Products Corp. et al. by *William L. Goldman* and *Anne G. Batter*; for Amway Corp. et al. by *Timothy B. Dyk* and *Edward K. Bilich*; for Chevron Corp. by *Toni Rembe*, *Jeffrey M. Vesely*, and *C. Douglas Floyd*; and for the Financial Institutions State Tax Coalition by *Philip M. Plant* and *Haskell Edelstein*.

(1982). A State may not tax a nondomiciliary corporation's income, however, if it is "derive[d] from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 224 (1980) (quoting *Mobil Oil, supra*, at 442, 439). This case presents the questions: (1) whether the unitary business principle remains an appropriate device for ascertaining whether a State has transgressed its constitutional limitations; and if so, (2) whether, under the unitary business principle, the State of New Jersey has the constitutional power to include in petitioner's apportionable tax base certain income that, petitioner maintains, was not generated in the course of its unitary business.

I

Petitioner Allied-Signal, Inc., is the successor-in-interest to the Bendix Corporation (Bendix). The present dispute concerns Bendix's corporate business tax liability to the State of New Jersey for the fiscal year ending September 30, 1981. Although three items of income were contested earlier, the controversy in this Court involves only one item: the gain of $211.5 million realized by Bendix on the sale of its 20.6% stock interest in ASARCO Inc. (ASARCO). The case was submitted below on stipulated facts, and we begin with a summary.

During the times in question, Bendix was a Delaware corporation with its commercial domicile and corporate headquarters in Michigan. Bendix conducted business in all 50 States and 22 foreign countries. App. 154. Having started business in 1929 as a manufacturer of aviation and automotive parts, from 1970 through 1981, Bendix was organized in four major operating groups: automotive; aerospace/electronics; industrial/energy; and forest products. *Id.*, at 154–155. Each operating group was under separate management, but the chief executive of each group reported to the chairman and chief executive officer of Bendix. *Id.*, at

155. In this period Bendix's primary operations in New Jersey were the development and manufacture of aerospace products. App. 161.

ASARCO is a New Jersey corporation with its principal offices in New York. It is one of the world's leading producers of nonferrous metals, treating ore taken from its own mines and ore it obtains from others. *Id.*, at 163–164. From December 1977 through November 1978, Bendix acquired 20.6% of ASARCO's stock by purchases on the open market. *Id.*, at 165. In the first half of 1981, Bendix sold its stock back to ASARCO, generating a gain of $211.5 million. *Id.*, at 172. The issue before us is whether New Jersey can tax an apportionable part of this income.

Our determination of the question whether the business can be called "unitary," see *infra*, at 788–789, is all but controlled by the terms of a stipulation between the taxpayer and the State. They stipulated: "During the period that Bendix held its investment in ASARCO, Bendix and ASARCO were unrelated business enterprises each of whose activities had nothing to do with the other." App. 169. Furthermore,

> "[p]rior to and after its investment in Asarco, no business or activity of Bendix (in New Jersey or otherwise), either directly or indirectly (other than the investment itself), was involved in the nonferrous metal production business or any other business or activity (in New Jersey or otherwise) in which Asarco was involved. On its part, Asarco had no business or activity (in New Jersey or otherwise) which, directly or indirectly, was involved in any of the businesses or activities (in New Jersey or otherwise) in which Bendix was involved. None of Asarco's activities, businesses or income (in New Jersey or otherwise) were related to or connected with Bendix's activities, business or income (in New Jersey or otherwise)." *Id.*, at 164–165.

The stipulation gives the following examples of the independence of the businesses:

> "There were no common management, officers, or employees of Bendix and Asarco. There was no use by Bendix of Asarco's corporate plant, offices or facilities and no use by Asarco of Bendix's corporate plant, offices or facilities. There was no rent or lease of any property by Bendix from Asarco and no rent or lease of any property by Asarco from Bendix. Bendix and Asarco were each responsible for providing their own legal services, contracting services, tax services, finance services and insurance. Bendix and Asarco had separate personnel and hiring policies . . . and separate pension and employee benefit plans. Bendix did not lend monies to Asarco and Asarco did not lend monies to Bendix. There were no joint borrowings by Bendix and Asarco. Bendix did not guaranty any of Asarco's debt and Asarco did not guaranty any of Bendix's debt. Asarco had no representative on Bendix's Board of Directors. Bendix did not pledge its Asarco stock. As far as can be determined there were no sales of product by Asarco itself to Bendix or by Bendix to Asarco. There were certain sales of product in the ordinary course of business by Asarco subsidiaries to Bendix but these sales were minute compared to Asarco's total sales . . . . These open market sales were at arms length prices and did not come about due to the Bendix investment in Asarco. There were no transfers of employees between Bendix and Asarco." *Id.*, at 169–171.

While Bendix held its ASARCO stock, ASARCO agreed to recommend that two seats on the 14-member ASARCO Board of Directors be filled by Bendix representatives. The seats were filled by Bendix chief executive officer W. M. Agee and a Bendix outside director. *Id.*, at 168. Nonetheless, "Bendix did not exert any control over Asarco." *Ibid.*

After respondent assessed Bendix for taxes on an apportioned amount which included in the base the gain realized upon Bendix's disposition of its ASARCO stock, Bendix sued for a refund in New Jersey Tax Court. The case was decided based upon the stipulated record we have described, and the Tax Court held that the assessment was proper. *Bendix Corp.* v. *Taxation Div. Director*, 10 N. J. Tax 46 (1988). The Appellate Division affirmed, *Bendix Corp.* v. *Director, Div. of Taxation*, 237 N. J. Super. 328, 568 A. 2d 59 (1989), and so, in turn, did the New Jersey Supreme Court, *Bendix Corp.* v. *Director, Div. of Taxation*, 125 N. J. 20, 592 A. 2d 536 (1991).

The New Jersey Supreme Court held it was constitutional to consider the gain realized from the sale of the ASARCO stock as earned in Bendix's unitary business, drawing from our decision in *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 166 (1983), the principle that "the context for determining whether a unitary business exists has, as an overriding consideration, the exchange or transfer of value, which may be evidenced by functional integration, centralization of management, and economies of scale." 125 N. J., at 34, 592 A. 2d, at 543–544. The New Jersey Supreme Court went on to state: "The tests for determining a unitary business are not controlled, however, by the relationship between the taxpayer recipient and the affiliate generator of the income that becomes the subject of State tax." *Id.*, at 35, 592 A. 2d, at 544. Based upon Bendix documents setting out corporate strategy, the court found that the acquisition and sale of ASARCO "went well beyond . . . passive investments in business enterprises," *id.*, at 36, 592 A. 2d, at 544, and Bendix "essentially had a business function of corporate acquisitions and divestitures that was an integral operational activity." *Ibid.* As support for its conclusion that the proceeds from the sale of the ASARCO stock were attributable to a unitary business, the New Jersey Supreme Court relied in part on the fact that Bendix intended to use those pro-

ceeds in what later proved to be an unsuccessful bid to acquire Martin Marietta, a company whose aerospace business, it was hoped, would complement Bendix's aerospace/electronics business. *Id.*, at 36, 592 A. 2d, at 545.

We granted certiorari. 502 U. S. 977 (1991). At the initial oral argument in this case New Jersey advanced the proposition that all income earned by a nondomiciliary corporation could be apportioned by any State in which the corporation does business. To understand better the consequences of this theory we requested rebriefing and reargument. Our order asked the parties to address three questions:

> "1. Should the Court overrule *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U. S. 307 (1982), and *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of New Mexico*, 458 U. S. 354 (1982)?
>
> "2. If *ASARCO* and *Woolworth* were overruled, should the decision apply retroactively?
>
> "3. If *ASARCO* and *Woolworth* were overruled, what constitutional principles should govern state taxation of corporations doing business in several states?" 503 U. S. 928 (1992).

Because we give a negative answer to the first question, see *infra*, at 783–786, we need not address the second and third.

II

The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co.* v. *Maryland*, 347 U. S. 340, 344–345 (1954). The reason the Commerce Clause includes this limit is self-evident: In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic conse-

quences for the national economy, as businesses could be subjected to severe multiple taxation. But the Due Process Clause also underlies our decisions in this area. Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax, see *Quill Corp.* v. *North Dakota, ante,* at 306–308. The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all. The present inquiry, by contrast, focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax. We are guided by the basic principle that the State's power to tax an individual's or corporation's activities is justified by the "protection, opportunities and benefits" the State confers on those activities. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444 (1940).

Because of the complications and uncertainties in allocating the income of multistate businesses to the several States, we permit States to tax a corporation on an apportionable share of the multistate business carried on in part in the taxing State. That is the unitary business principle. It is not a novel construct, but one that we approved within a short time after the passage of the Fourteenth Amendment's Due Process Clause. We now give a brief summary of its development.

When States attempted to value railroad or telegraph companies for property tax purposes, they encountered the difficulty that what makes such a business valuable is the enterprise as a whole, rather than the track or wires that happen to be located within a State's borders. The Court held that, consistent with the Due Process Clause, a State could base its tax assessments upon "the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an

appreciable extent throughout the entire domain of operation." *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 220–221 (1897) (citing *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530 (1888)); *Massachusetts* v. *Western Union Telegraph Co.*, 141 U. S. 40 (1891); *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (1891); *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421 (1894); *Cleveland, C., C. & St. L. R. Co.* v. *Backus*, 154 U. S. 439 (1894); *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1 (1896); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (1891).

Adams Express recognized that the principles that permit a State to levy a tax on the capital stock of a railroad, telegraph, or sleeping car company by reference to its unitary business also allow proportional valuation of a unitary business in enterprises of other sorts. As the Court explained: "The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use." 165 U. S., at 221.

The unitary business principle was later permitted for state taxation of corporate income as well as property and capital. Thus, in *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–121 (1920), we explained:

> "The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other States. In this it was typical of a large part of the manufacturing business conducted in the State. The legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State."

As these cases make clear, the unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income that cannot in fairness be attributed to the taxpayer's activities within the State. It is this second component, the necessity for a limiting principle, that underlies this case.

As we indicated in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S., at 442: "Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business." The constitutional question becomes whether the income "derive[s] from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S., at 224 (quoting *Mobil Oil*, *supra*, at 442, 439).

Although *Mobil Oil* and *Exxon* made clear that the unitary business principle limits the States' taxing power, it was not until our decisions in *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307 (1982), and *F. W. Woolworth Co.* v. *Taxation and Revenue Dept. of N. M.*, 458 U. S. 354 (1982), that we struck down a state attempt to include in the apportionable tax base income not derived from the unitary business. In those cases the States sought to tax unrelated business activity.

The principal question in *ASARCO* concerned Idaho's attempt to include in the apportionable tax base of ASARCO certain dividends received from, among other companies, the Southern Peru Copper Corp. 458 U. S., at 309, 320. The analysis is of direct relevance for us because we have held that for constitutional purposes capital gains should be treated as no different from dividends. *Id.*, at 330. The ASARCO in the 1982 case was the same company as the

ASARCO here. It was one of four of Southern Peru's shareholders, owning 51.5% of its stock. Under an agreement with the other shareholders, ASARCO was prevented from dominating Southern Peru's board of directors. ASARCO had the right to appoint 6 of Southern Peru's 13 directors, while 8 votes were required for the passage of any resolution. Southern Peru was in the business of producing unrefined copper (a nonferrous ore), some of which it sold to its shareholders. ASARCO purchased approximately 35% of Southern Peru's output, at average representative trade prices quoted in a trade publication and over which neither Southern Peru nor ASARCO had any control. *Id.*, at 320–322. We concluded that "ASARCO's Idaho silver mining and Southern Peru's autonomous business [were] insufficiently connected to permit the two companies to be classified as a unitary business." *Id.*, at 322.

On the same day we decided *ASARCO*, we decided *Woolworth*. In that case, the taxpayer company was domiciled in New York and operated a chain of retail variety stores in the United States. In the company's apportionable state tax base, New Mexico sought to include earnings from four subsidiaries operating in foreign countries. The subsidiaries also engaged in chainstore retailing. 458 U. S., at 356–357. We observed that although the parent company had the potential to operate the subsidiaries as integrated divisions of a single unitary business, that potential was not significant if the subsidiaries in fact comprise discrete business operations. *Id.*, at 362. Following the indicia of a unitary business defined in *Mobil Oil*, we inquired whether any of the three objective factors were present. The factors were: (1) functional integration; (2) centralization of management; and (3) economies of scale. 458 U. S., at 364. We found that "[e]xcept for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary," *id.*, at 369,

none of these factors was present. The subsidiaries were found not to be part of a unitary business. *Ibid.*

Our most recent case applying the unitary business principle was *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159 (1983). The taxpayer there was a vertically integrated corporation which manufactured custom-ordered paperboard packaging. *Id.*, at 171. California sought to tax income it received from its wholly owned and mostly owned foreign subsidiaries, each of which was in the same business as the parent. *Id.*, at 171–172. The foreign subsidiaries were given a fair degree of autonomy: They purchased only 1% of their materials from the parent, and personnel transfers from the parent to the subsidiaries were rare. *Id.*, at 172. We recognized, however:

> "[I]n certain respects, the relationship between appellant and its subsidiaries was decidedly close. For example, approximately half of the subsidiaries' long-term debt was either held directly, or guaranteed, by appellant. Appellant also provided advice and consultation regarding manufacturing techniques, engineering, design, architecture, insurance, and cost accounting to a number of its subsidiaries, either by entering into technical service agreements with them or by informal arrangement. Finally, appellant occasionally assisted its subsidiaries in their procurement of equipment, either by selling them used equipment of its own or by employing its own purchasing department to act as an agent for the subsidiaries." *Id.*, at 173.

Based on these facts, we found that the taxpayer had not met its burden of showing by "'"clear and cogent evidence"'" that the State sought to tax extraterritorial values. *Id.*, at 175, 164 (quoting *Exxon Corp.*, *supra*, at 221, in turn quoting *Butler Brothers* v. *McColgan*, 315 U. S. 501, 507 (1942), in turn quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936)).

In the course of our decision in *Container Corp.*, we reaffirmed that the constitutional test focuses on functional integration, centralization of management, and economies of scale. 463 U. S., at 179 (citing *Woolworth*, *supra*, at 364; *Mobil Oil*, *supra*, at 438). We also reiterated that a unitary business may exist without a flow of goods between the parent and subsidiary, if instead there is a flow of value between the entities. 463 U. S., at 178. The principal virtue of the unitary business principle of taxation is that it does a better job of accounting for "the many subtle and largely unquantifiable transfers of value that take place among the components of a single enterprise" than, for example, geographical or transactional accounting. *Id.*, at 164–165 (citing *Mobil Oil*, 445 U. S., at 438–439).

Notwithstanding the Court's long experience in applying the unitary business principle, New Jersey and several *amici curiae* argue that it is not an appropriate means for distinguishing between income generated within a State and income generated without. New Jersey has not persuaded us to depart from the doctrine of *stare decisis* by overruling our cases that announce and follow the unitary business standard. In deciding whether to depart from a prior decision, one relevant consideration is whether the decision is "unsound in principle." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985). Another is whether it is "unworkable in practice." *Ibid.* And, of course, reliance interests are of particular relevance because "[a]dherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991) (citing *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986)). See also *Quill Corp.* v. *North Dakota*, *ante*, at 316 (industry's reliance justifies adherence to precedent); *ante*, at 320 (SCALIA, J., concurring in part and concurring in judgment) (same). Against this background we address the arguments of New Jersey and its *amici*.

New Jersey contends that the unitary business principle must be abandoned in its entirety, arguing that a nondomiciliary State should be permitted "to apportion all the income of a separate multistate corporate taxpayer." Brief for Respondent on Reargument 27. According to New Jersey, the unitary business principle does not reflect economic reality, while its proposed theory does. We are not convinced.

New Jersey does not appear to dispute the basic proposition that a State may not tax value earned outside its borders. It contends instead that all income of a corporation doing any business in a State is, by virtue of common ownership, part of the corporation's unitary business and apportionable. See Tr. of Oral Arg. 25–26 (Apr. 22, 1992). New Jersey's sweeping theory cannot be reconciled with the concept that the Constitution places limits on a State's power to tax value earned outside of its borders. To be sure, our cases give States wide latitude to fashion formulae designed to approximate the in-state portion of value produced by a corporation's truly multistate activity. But that is far removed from New Jersey's theory that any business in the State, no matter how small or unprofitable, subjects all of a corporation's out-of-state income, no matter how discrete, to apportionment.

According to New Jersey, Brief for Respondent on Reargument 11, there is no logical distinction between short-term investment of working capital, which all concede is apportionable, see Reply Brief for Petitioner on Reargument 4–5, and n. 3; Tr. of Oral Arg. 7–8 (Apr. 22, 1992); *Container Corp., supra*, at 180, n. 19, and all other investments. The same point was advanced by the dissent in *ASARCO*, 458 U. S., at 337 (opinion of O'CONNOR, J.). New Jersey's basic theory is that multistate corporations like Bendix regard all of their holdings as pools of assets, used for maximum long-term profitability, and that any distinction between operational and investment assets is artificial. We may assume, *arguendo*, that the managers of Bendix cared most about the

profits entry on a financial statement, but that state of mind sheds little light on the question whether in pursuing maximum profits they treated particular intangible assets as serving, on the one hand, an investment function, or, on the other, an operational function. See *Container Corp., supra,* at 180, n. 19. That is the relevant unitary business inquiry, one which focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the taxing State. It is an inquiry to which our cases give content, and which is necessary if the limits of the Due Process and Commerce Clauses are to have substance in a modern economy. In short, New Jersey's suggestion is not in accord with the well-established and substantial case law interpreting the Due Process and Commerce Clauses.

Our precedents are workable in practice; indeed, New Jersey conceded as much. See Tr. of Oral Arg. 37–38 (Apr. 22, 1992). If lower courts have reached divergent results in applying the unitary business principle to different factual circumstances, that is because, as we have said, any number of variations on the unitary business theme "are logically consistent with the underlying principles motivating the approach," *Container Corp., supra,* at 167, and also because the constitutional test is quite fact sensitive.

Indeed, if anything would be unworkable in practice, it would be for us now to abandon our settled jurisprudence defining the limits of state power to tax under the unitary business principle. State legislatures have relied upon our precedents by enacting tax codes which allocate intangible nonbusiness income to the domiciliary State, see App. to Brief for Petitioner on Reargument 1a–7a (collecting statutes). Were we to adopt New Jersey's theory, we would be required either to invalidate those statutes or authorize what would be certain double taxation. And, of course, we would defeat the reliance interest of those corporations that have structured their activities and paid their taxes based upon the well-established rules we here confirm. Difficult ques-

tions respecting the retroactive effect of our decision would also be presented. See *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991). New Jersey's proposal would disrupt settled expectations in an area of the law in which the demands of the national economy require stability.

Not willing to go quite so far as New Jersey, some *amici curiae* urge us to modify, rather than abandon, the unitary business principle. See, *e. g.*, Brief for Multistate Tax Commission as *Amicus Curiae;* Brief for Multistate Tax Commission as *Amicus Curiae* on Reargument; Brief for Chevron Corporation as *Amicus Curiae.* They urge us to hold that the Constitution does not require a unitary business relation between the payor and the payee in order for a State to apportion the income the payee corporation receives from an investment in the payor. Rather, they urge us to adopt as the constitutional test the standard set forth in the business income definition in § 1(a) of the Uniform Division of Income for Tax Purposes Act (UDITPA), 7A U. L. A. 331, 336 (1985). Under UDITPA, "business income," which is apportioned, is defined as: "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." UDITPA § 1(a). "Non-business income," which is allocated, is defined as "all income other than business income." § 1(e).

In the abstract, these definitions may be quite compatible with the unitary business principle. See *Container Corp., supra,* at 167 (noting that most of the relevant provisions of the California statute under which we sustained the challenged tax there were derived from UDITPA). Furthermore, the unitary business principle is not so inflexible that as new methods of finance and new forms of business evolve it cannot be modified or supplemented where appropriate. It does not follow, though, that apportionment of all income

is permitted by the mere fact of corporate presence within the State; and New Jersey offers little more in support of the decision of the State Supreme Court.

We agree that the payee and the payor need not be engaged in the same unitary business as a prerequisite to apportionment in all cases. *Container Corp.* says as much. What is required instead is that the capital transaction serve an operational rather than an investment function. 463 U. S., at 180, n. 19. Hence, in *ASARCO,* although we rejected the dissent's factual contention that the stock investments there constituted "interim uses of idle funds 'accumulated for the future operation of [the taxpayer's] . . . business [operation],'" we did not dispute the suggestion that had that been so the income would have been apportionable. 458 U. S., at 325, n. 21.

To be sure, the existence of a unitary relation between the payor and the payee is one means of meeting the constitutional requirement. Thus, in *ASARCO* and *Woolworth* we focused on the question whether there was such a relation. We did not purport, however, to establish a general requirement that there be a unitary relation between the payor and the payee to justify apportionment, nor do we do so today.

It remains the case that "[i]n order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to [those carried out in the taxing] State.'" *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S., at 223 (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S., at 439). The existence of a unitary relation between payee and payor is one justification for apportionment, but not the only one. Hence, for example, a State may include within the apportionable income of a nondomiciliary corporation the interest earned on short-term deposits in a bank located in another State if that income forms part of the working capital of the corporation's unitary business, notwithstanding the absence of a unitary relationship be-

tween the corporation and the bank. That circumstance, of course, is not at all presented here. See *infra* this page and 789.

III

Application of the foregoing principles to the present case yields a clear result: The stipulated factual record now before us presents an even weaker basis for inferring a unitary business than existed in either *ASARCO* or *Woolworth*, making this an *a fortiori* case. There is no serious contention that any of the three factors upon which we focused in *Woolworth* were present. Functional integration and economies of scale could not exist because, as the parties have stipulated, "Bendix and Asarco were unrelated business enterprises each of whose activities had nothing to do with the other." App. 169. Moreover, because Bendix owned only 20.6% of ASARCO's stock, it did not have the potential to operate ASARCO as an integrated division of a single unitary business, and of course, even potential control is not sufficient. *Woolworth*, 458 U. S., at 362. There was no centralization of management.

Furthermore, contrary to the view expressed below by the New Jersey Supreme Court, see 125 N. J., at 36–37, 592 A. 2d, at 544–545, the mere fact that an intangible asset was acquired pursuant to a long-term corporate strategy of acquisitions and dispositions does not convert an otherwise passive investment into an integral operational one. Indeed, in *Container Corp.* we noted the important distinction between a capital transaction that serves an investment function and one that serves an operational function. 463 U. S., at 180, n. 19 (citing *Corn Products Refining Co.* v. *Commissioner*, 350 U. S. 46, 50–53 (1955)). If that distinction is to retain its vitality, then, as we held in *ASARCO*, the fact that a transaction was undertaken for a business purpose does not change its character. 458 U. S., at 326. Idaho had argued that intangible income could be treated as earned in the course of a unitary business if the intangible property

which produced that income is "'acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business.'" *Ibid.* (quoting Brief for Appellee 4). In rejecting the argument we observed:

> "This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be 'for purposes related to or contributing to the [corporation's] business.' When pressed to its logical limit, this conception of the 'unitary business' limitation becomes no limitation at all." 458 U. S., at 326.

Apart from semantics, we see no distinction between the "purpose" test we rejected in *ASARCO* and the "ingrained acquisition-divestiture policy" approach adopted by the New Jersey Supreme Court. 125 N. J., at 36, 592 A. 2d, at 544. The hallmarks of an acquisition that is part of the taxpayer's unitary business continue to be functional integration, centralization of management, and economies of scale. *Container Corp.* clarified that these essentials could respectively be shown by: transactions not undertaken at arm's length, 463 U. S., at 180, n. 19; a management role by the parent that is grounded in its own operational expertise and operational strategy, *ibid.*; and the fact that the corporations are engaged in the same line of business, *id.*, at 178. It is undisputed that none of these circumstances existed here.

The New Jersey Supreme Court also erred in relying on the fact that Bendix intended to use the proceeds of its gain from the sale of ASARCO to acquire Martin Marietta. Even if we were to assume that Martin Marietta, once acquired, would have been operated as part of Bendix's unitary business, that reveals little about whether ASARCO was run as part of Bendix's unitary business. Nor can it be main-

tained that Bendix's shares of ASARCO stock, which it held for over two years, amounted to a short-term investment of working capital analogous to a bank account or certificate of deposit. See *Container Corp.*, 463 U. S., at 180, n. 19; *ASARCO*, 458 U. S., at 325, n. 21.

In sum, the agreed-upon facts make clear that under our precedents New Jersey was not permitted to include the gain realized on the sale of Bendix's ASARCO stock in the former's apportionable tax base.

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE THOMAS join, dissenting.

In my view, petitioner has not shown by "clear and cogent evidence" that its investment in ASARCO was not operationally related to the aerospace business petitioner conducted in New Jersey. *Exxon Corp.* v. *Department of Revenue of Wis.*, 447 U. S. 207, 221 (1980) (internal quotation marks omitted). Though I am largely in agreement with the Court's analysis, I part company on the application of it here.

I agree with the Court that we cannot adopt New Jersey's suggestion that the unitary business principle be replaced by a rule allowing a State to tax a proportionate share of all the income generated by any corporation doing business there. See *ante*, at 784. Were we to adopt a rule allowing taxation to depend upon corporate identity alone, as New Jersey suggests, the entire due process inquiry would become fictional, as the identities of corporations would fracture in a corporate shell game to avoid taxation. Under New Jersey's theory, for example, petitioner could avoid having its ASARCO investment taxed in New Jersey simply by establishing a separate subsidiary to hold those earnings outside New Jersey. A constitutional principle meant to ensure

that States tax only business activities they can reasonably claim to have helped support should depend on something more than manipulations of corporate structure. See *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 440 (1980) ("[T]he form of business organization may have nothing to do with the underlying unity or diversity of business enterprise"); *Fargo* v. *Hart*, 193 U. S. 490 (1904) (refusing to find unitary business even though single owner); *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S. 194, 222 (1897) (same).

New Jersey suggests that we should presume that all the holdings of a single corporation are mutually interdependent because common ownership will stabilize profits from the commonly held businesses, generating flows of value between them that make them part of a unity. While it may be true that many corporations attempt to diversify their holdings to avoid business cycles, we have refused to presume a flow of value into an in-state business from the potential benefits of being part of a larger multistate, multibusiness corporation. The reason for this is simple: Diversification may benefit the corporation as an entity without necessarily affecting the business activity in the taxing State and without requiring any support from the taxing State. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940) (State may not tax where it has not "given anything for which it can ask return").

I also agree with the Court that there need not be a unitary relationship between the underlying business of a taxpayer and the companies in which it invests in order for a State to tax investment income. See *ante*, at 787. "[A]ctive operational control" of the investment income payor by the taxpayer is certainly not required. *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 343 (1982) (O'CONNOR, J., dissenting). Insofar as a requirement that the investment payor and payee be unitary was suggested by our decisions in *ASARCO* and *F. W. Woolworth Co.* v. *Taxation and Reve-*

nue Dept. of N. M., 458 U. S. 354 (1982), petitioner concedes that was a "doctrinal foot fault." Reply Brief for Petitioner on Reargument 4. Although a unitary relationship between the investment income payor and payee would suffice to relate the investment income to the in-state business, such a connection is not necessary. Taxation of investment income received from a nondomiciliary taxpayer's investment in another corporation requires only that the investment income be sufficiently related to the taxpayer's in-state business, not that the taxpayer's business and the corporation in which it invests be unitary. Only when the State seeks to tax directly the *income* of a nondomiciliary taxpayer's subsidiary or affiliate through combined reporting, see *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169, and n. 7 (1983), must the underlying businesses of the taxpayer and its affiliate or subsidiary be unitary. In any case, the key question for purposes of due process is whether the income that the State seeks to tax is, by the time it is realized, sufficiently related to a unitary business, part of which operates in the taxing State.

In this connection, I agree with the Court that out-of-state investments serving an operational function in the nondomiciliary taxpayer's in-state business are sufficiently related to that business to be taxed. In particular, I agree that "'interim uses of idle funds "accumulated for the future operation of [the taxpayer's] business [operation],"'" may be taxed. *Ante*, at 787 (quoting *ASARCO, supra*, at 325, n. 21). The Court, however, leaves "operational function" largely undefined. I presume that the Court's test allows taxation in at least those circumstances in which it is allowed by the Uniform Division of Income for Tax Purposes Act (UDITPA). *Ante*, at 786. UDITPA counts as apportionable business income from "tangible and intangible property if the acquisition, management, and disposition of the property constitute *integral parts* of the taxpayer's regular trade or business operations." UDITPA § 1(a), 7A U. L. A. 336

(1985) (emphasis added). Presumably, investment income serves an operational function if it is, to give only some examples, intended to be used by the time it is realized for making the business' anticipated payments; for expanding or replacing plants and equipment; or for acquiring other unitary businesses that will serve the in-state business as stable sources of supply or demand, or that will generate economies of scale or savings in administration.

In its application of these principles to this case, however, I diverge from the Court's analysis. The Court explains that while "interest earned on short-term deposits in a bank located in another State" may be taxed "if that income forms part of the working capital of the corporation's unitary business," petitioner's longer term investment in ASARCO may not be taxed. *Ante*, at 787. The Court finds the investment here not to be operational because it was not analogous to a "short-term investment of working capital analogous to a bank account or certificate of deposit." *Ante*, at 790.

Any distinction between short-term and long-term investments cannot be of constitutional dimension. Whether an investment is short-term or long-term, what matters for due process purposes is whether the investment is operationally related to the in-state business. "The interim investment of retained earnings prior to their commitment to a major corporate project . . . merely recapitulates on a grander scale the short-term investment of working capital prior to its commitment to the daily financial needs of the company." *ASARCO*, *supra*, at 338 (O'CONNOR, J., dissenting). I see no distinction relevant to due process between investing in a company in order to build capital to acquire a second company related to the in-state business and, for example, "leas[ing] for a term of years the areas of [the taxpayer's] office buildings into which it intends ultimately to expand," which could hardly be claimed to set up a "separate and unrelated leasing business." 458 U. S., at 338, n. 6.

The link between the ASARCO investment here and the in-state business is closer than the Court suggests. It is not just that the ASARCO investment was made to benefit *Bendix* as a corporate entity. As the Court points out, any investment a corporation makes is intended to benefit the corporation in general. *Ante*, at 789. The proper question is rather: Was the income New Jersey seeks to tax intended to be used to benefit a unitary business of which Bendix's New Jersey operations were a part?

Petitioner has not carried the heavy burden of showing by clear and cogent evidence that the capital gains from ASARCO were not operationally related to its in-state business. See *Container Corp., supra*, at 175. Though this case comes to us on a stipulated record, there is no stipulation that the ASARCO capital gains were not intended to be used to benefit a unitary business, part of which operated in New Jersey. Instead, the record suggests that, by the time the capital gains were realized, at least some of the income was intended to be used in the attempt to acquire a corporation also engaged in the aerospace industry. App. 70–71, 81, 193. The acquisition of Martin Marietta, had it succeeded, would have been part of petitioner's unitary aerospace business, part of which operated in New Jersey. *Id.*, at 194. As the New Jersey Supreme Court found: "[T]he purpose of acquiring Martin Marietta was to complement the aerospace-electronics facets of Bendix business, some of which are located in New Jersey. . . . Even though the Martin Marietta takeover never came to fruition, the fact that it served as a goal for part of the capital generated by the sales of ASARCO . . . stock nurtures the premise that Bendix's ingrained policy of acquisitions and divestitures projected the existence of a unitary business." *Bendix Corp.* v. *Director, Div. of Taxation*, 125 N. J. 20, 38, 592 A. 2d 536, 545 (1991). We will, "if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a 'unitary business.'" *Container Corp., supra*,

at 175. Because petitioner has failed to show by clear and cogent evidence that the income derived from the ASARCO investment was not related to the operations of its unitary aerospace business, part of which was in New Jersey, New Jersey should be able to apportion and tax that income. As the Court holds that it may not, I must respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 795 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MAY 6 THROUGH JUNE 17, 1992

MAY 6, 1992

Certiorari Denied

No. 91–7832 (A–783). MAY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 955 F. 2d 299.

No. 91–8166 (A–823). MAY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 961 F. 2d 74.

MAY 7, 1992

Dismissal Under Rule 46

No. 91–980. COLORADO ET AL. *v.* KUHN ET AL. Sup. Ct. Colo. Certiorari dismissed under this Court's Rule 46. Reported below: 817 P. 2d 101.

Miscellaneous Orders

No. A–824. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

No. A–824. HILL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Motion to reconsider order of May 7, 1992, denying application for stay of execution denied.

MAY 11, 1992

Miscellaneous Order

No. A–838. MARTIN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution

of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

Certiorari Denied

No. 91–8190 (A–835). MARTIN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 599 So. 2d 119.

MAY 13, 1992

Miscellaneous Order

No. A–829. GANTT ET AL. *v.* SKELOS ET AL. Application to stay an order of the United States District Court for the Eastern District of New York, presented to JUSTICE THOMAS, and by him referred to the Court, granted, and it is ordered that the portion of the order of the United States District Court for the Eastern District of New York, case Nos. CV–92–1521 (SJ) and CV–92–1776 (SJ), entered May 5, 1992, enjoining further proceedings in *Reid* v. *Marino,* Index No. 9567/92, now pending in the Supreme Court of New York, County of Kings, is stayed pending the timely filing and disposition of an appeal in this Court. Further consideration of motion to expedite is deferred to timely filing of a statement as to jurisdiction in the above-entitled appeal.

MAY 15, 1992

Dismissal Under Rule 46

No. 91–7963. IN RE DEMPSEY. Petition for writ of mandamus dismissed under this Court's Rule 46.

MAY 18, 1992

Affirmed on Appeal

No. 91–1553. CAMP, SECRETARY OF STATE OF ALABAMA *v.* WESCH ET AL. Affirmed on appeal from D. C. S. D. Ala. Reported below: 785 F. Supp. 1491.

Certiorari Granted—Vacated and Remanded

No. 91–169. LUJAN, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL. C. A. 10th Cir. Certiorari granted, judg-

ment vacated, and case remanded for further consideration in light of *Department of Energy* v. *Ohio*, 503 U. S. 607 (1992). Reported below: 931 F. 2d 1421.

No. 91–1475. FLORIDA *v.* WALKER. Dist. Ct. App. Fla., 5th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991). Reported below: 573 So. 2d 415.

Miscellaneous Orders

No. ———. HAUGH ET AL. *v.* BULLIS SCHOOL, INC. Motion for reconsideration of denial of leave to file petition for writ of certiorari out of time [503 U. S. 931] denied.

No. A–693 (91–1618). VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL. Appeal from D. C. N. D. Ohio. Motion of appellees to dismiss this Court's stay order of April 20, 1992 [503 U. S. 979], denied.

No. A–797. TRINSEY *v.* VALENTI ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–821. GONZALEZ *v.* WILKEY, SPECIAL COUNSEL. D. C. D. C. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1086. IN RE DISBARMENT OF NUZZO. Disbarment entered. [For earlier order herein, see 503 U. S. 902.]

No. D–1104. IN RE DISBARMENT OF BLANK. Gary L. Blank, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 30, 1992 [503 U. S. 956], is hereby discharged.

No. D–1105. IN RE DISBARMENT OF MEKAS. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1117. IN RE DISBARMENT OF HUGHES. It is ordered that Stephen D. Hughes, of Dunedin, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1118. IN RE DISBARMENT OF PLAIA. It is ordered that Alan A. Plaia, of Newport Beach, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1119. IN RE DISBARMENT OF O'HARA. It is ordered that James F. O'Hara, of Little Rock, Ark., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1120. IN RE DISBARMENT OF SEGERS. It is ordered that Joseph Wm. Segers, Jr., of Fort Worth, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1121. IN RE DISBARMENT OF RAGANO. It is ordered that Frank Ragano, of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1122. IN RE DISBARMENT OF BALES. It is ordered that Lester Bales, of Zephyrhills, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1123. IN RE DISBARMENT OF HOUCK. It is ordered that William Jerome Houck, of Hickory, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1124. IN RE DISBARMENT OF GLUBIN. It is ordered that Bruce Allan Glubin, of Lynbrook, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1125. IN RE DISBARMENT OF SCHULZ. It is ordered that Richard C. Schulz, of Bay Shore, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Second Interim Report of the Special Master received and ordered filed. Exceptions to this Report and the first Interim Report of the Special Master, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, if any, may be filed within 30 days. The *amici curiae* may file exceptions and replies within the time allowed the parties. Further consideration of motion of Nebraska for leave to file an amended petition deferred to consideration of the exceptions and replies. [For earlier order herein, see, *e. g.*, 503 U. S. 981.]

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Motions of Connecticut Office of Consumer Counsel and United Illuminating Co. et al. for leave to intervene referred to the Special Master. JUSTICE SOUTER took no part in the consideration or decision of these motions. [For earlier order herein, see, *e. g.*, 503 U. S. 1002.]

No. 87–746. MICHAEL H. ET AL. *v.* GERALD D., 491 U. S. 110. Motion of appellants to recall and amend or, in the alternative, to clarify judgment of this Court denied. JUSTICE SOUTER and JUSTICE THOMAS took no part in the consideration or decision of this motion.

No. 91–321. ITEL CONTAINERS INTERNATIONAL CORP. *v.* HUDDLESTON, COMMISSIONER OF REVENUE OF TENNESSEE. Sup. Ct. Tenn. [Certiorari granted, 502 U. S. 1090.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Institute of International Container Lessors et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for argument denied.

No. 91–719. PARKE, WARDEN *v.* RALEY. C. A. 6th Cir. [Certiorari granted, 503 U. S. 905.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–886. REYES ET AL. *v.* ERNST & YOUNG. C. A. 8th Cir. [Certiorari granted, 502 U. S. 1090.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–871. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 1st Cir. [Certiorari granted, 503 U. S. 935.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 91–1328. CITY OF CHICAGO ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. 7th Cir.; and

No. 91–1546. SLAGLE *v.* TERRAZAS ET AL. Appeal from D. C. W. D. Tex. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 91–1523. FLORENCE COUNTY SCHOOL DISTRICT FOUR ET AL. *v.* CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, CARTER. C. A. 4th Cir. Motion of National Association of State Boards of Education for leave to file a brief as *amicus curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–1527. OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM *v.* SICHERMAN, TRUSTEE. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 91–1550. MCCLEARY *v.* NAVARRO ET UX. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted.

No. 91–6824. ZAFIRO ET AL. *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 503 U. S. 935.] Motion for appointment of counsel granted, and it is ordered that Kenneth L. Cunniff, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioners in this case.

No. 91–7340. GARSON *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 7th Cir.; and

No. 91–7783. VADEN *v.* LUJAN, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 8,

1992, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

No. 91–7742. HUFFSMITH *v.* WYOMING COUNTY PRISON BOARD ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 8, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 91–8019. IN RE HILL; and
No. 91–8023. IN RE ALDRIDGE. Petitions for writs of habeas corpus denied.

No. 91–7656. IN RE COX;
No. 91–7686. IN RE DESANTIS; and
No. 91–7858. IN RE STROMAN. Petitions for writs of mandamus denied.

No. 91–7472. IN RE BALLARD. Petition for writ of mandamus and/or prohibition denied.

No. 91–7640. IN RE TEDDER. Petition for writ of prohibition denied.

Certiorari Granted

No. 91–794. HARPER ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. Certiorari granted.* Reported below: 242 Va. 322, 410 S. E. 2d 629.

No. 91–1496. REITER ET AL. *v.* COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 949 F. 2d 107.

No. 91–1513. UNITED STATES DEPARTMENT OF THE TREASURY ET AL. *v.* FABE, SUPERINTENDENT OF INSURANCE OF OHIO. C. A. 6th Cir. Certiorari granted. Reported below: 939 F. 2d 341.

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*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 954.]

No. 91–261. BUILDING & CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.; and No. 91–274. MASSACHUSETTS WATER RESOURCES AUTHORITY ET AL. *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL. C. A. 1st Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 935 F. 2d 345.

No. 91–1306. UNITED STATES *v.* OLANO ET AL. C. A. 9th Cir. Motion of respondent Guy W. Olano, Jr., for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 934 F. 2d 1425.

No. 91–1393. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* FRETWELL. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 946 F. 2d 571.

No. 91–1521. UNITED STATES *v.* GREEN. Ct. App. D. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 592 A. 2d 985.

No. 91–7873. FEX *v.* MICHIGAN. Sup. Ct. Mich. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 439 Mich. 117, 479 N. W. 2d 625.

Certiorari Denied

No. 91–381. ILLINOIS EX REL. OFFICE OF PUBLIC COUNSEL ET AL. *v.* ILLINOIS COMMERCE COMMISSION ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 143 Ill. 2d 407, 574 N. E. 2d 650.

No. 91–1035. BUSSEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 942 F. 2d 1241.

No. 91–1118. BAUMANN *v.* SAVERS FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 934 F. 2d 1506.

No. 91–1151. ADKINS ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 1201.

No. 91–1197. WESTCHESTER MANAGEMENT CORP., DBA SALEM PARK NURSING HOME *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 279.

No. 91–1248. ESTATE OF HOFFPAUIR ET AL. *v.* SUDWISHER. Sup. Ct. La. Certiorari denied. Reported below: 589 So. 2d 474.

No. 91–1251. RAINEY BROTHERS CONSTRUCTION CO., INC., ET AL. *v.* MEMPHIS AND SHELBY COUNTY BOARD OF ADJUSTMENT ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 821 S. W. 2d 938.

No. 91–1263. SEWELL-ALLEN BIG STAR, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 52.

No. 91–1272. LEVY ET AL. *v.* MARTIN, SECRETARY OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 639.

No. 91–1274. WRIGHT *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF UNION NATIONAL BANK OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 1089.

No. 91–1295. ELMORE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 33 M. J. 387.

No. 91–1303. TRIPLE M DRILLING CO. ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR MBANK HOUSTON, NATIONAL ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–1304. LAMORTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 950 F. 2d 80.

No. 91–1314. MURPHY *v.* MARCUM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 886.

No. 91–1330. COMBS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 903.

No. 91–1332. CHANG, EXECUTRIX OF THE ESTATE OF CHANG *v.* ARGONNE NATIONAL LABORATORY. C. A. 7th Cir. Certiorari denied.

No. 91–1337. McCoy, Administrator of the Electrical Workers Trust Funds, Local 103 I. B. E. W. *v.* Massachusetts Institute of Technology. C. A. 1st Cir. Certiorari denied. Reported below: 950 F. 2d 13.

No. 91–1339. Ferra *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 948 F. 2d 352.

No. 91–1354. Cherokee Nation of Oklahoma *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 937 F. 2d 1539.

No. 91–1360. Bennett, Individually and as Mayor of Palos Hills, et al. *v.* Hansen. C. A. 7th Cir. Certiorari denied. Reported below: 948 F. 2d 397.

No. 91–1368. Falk et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 836.

No. 91–1369. Lerman et ux. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 722.

No. 91–1371. Canino *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 928.

No. 91–1378. Mohney *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 2d 1397.

No. 91–1379. Pittman, a Minor, by his Next Friend and Father, Pittman, et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1163.

No. 91–1387. City of Cathedral City et al. *v.* Hoesterey. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 317.

No. 91–1415. Loxley *v.* Newport News Shipbuilding & Dry Dock Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: 934 F. 2d 511.

No. 91–1430. Texaco Inc. *v.* Mason, Individually and as Administrator of the Estate of Mason, Deceased. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1546.

No. 91–1432. Nigerian National Petroleum Corp. *v.* Caribbean Trading & Fidelity Corp. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 111.

No. 91–1433. GREAT WESTERN COAL (KENTUCKY), INC., ET AL. *v.* SOUTH CAROLINA PUBLIC SERVICE AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 349.

No. 91–1434. BAILEY ET AL. *v.* NORTH CAROLINA ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 330 N. C. 227, 412 S. E. 2d 295.

No. 91–1437. BROADCAST MUSIC, INC., ET AL. *v.* CLAIRE'S BOUTIQUES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 1482.

No. 91–1442. COOK, WARDEN *v.* LAFFERTY. C. A. 10th Cir. Certiorari denied. Reported below: 949 F. 2d 1546.

No. 91–1449. PHILLIPS ET AL. *v.* ALASKA HOTEL & RESTAURANT EMPLOYEES PENSION FUND. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 509.

No. 91–1450. ROBINSON ET AL. *v.* BRUNING. C. A. 10th Cir. Certiorari denied. Reported below: 949 F. 2d 352.

No. 91–1451. MESA PETROLEUM CO. ET AL. *v.* COLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1512.

No. 91–1459. OEHMKE *v.* FREED. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 349.

No. 91–1460. EASTON *v.* SUNDRAM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 1011.

No. 91–1461. MARTIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 588 So. 2d 526.

No. 91–1469. BRUTOCO ENGINEERING & CONSTRUCTION, INC. *v.* AMERICAN INTERNATIONAL GROUP, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 234 Cal. App. 3d 749, 285 Cal. Rptr. 765.

No. 91–1470. FRYAR *v.* ABELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1160.

No. 91–1471. VELOZ-GERTRUDIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–1472. WADE *v.* SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 730.

No. 91–1474. FARRINGTON *v.* BUREAU OF NATIONAL AFFAIRS, INC., ET AL. Ct. App. D. C. Certiorari denied. Reported below: 596 A. 2d 58.

No. 91–1478. ANDERSON ET AL. *v.* BATTLE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 945 F. 2d 411.

No. 91–1479. KLEIN *v.* HARTNETT, COMMISSIONER OF LABOR OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 78 N. Y. 2d 662, 585 N. E. 2d 809.

No. 91–1480. CITY OF PONCA CITY *v.* HOUSING AUTHORITY OF KAW TRIBE OF INDIANS OF OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1183.

No. 91–1484. MOORE ET AL. *v.* KELLER INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 199.

No. 91–1485. MYERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 588 So. 2d 105.

No. 91–1486. ISAACS *v.* WALKER. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1281.

No. 91–1487. JONES ET AL. *v.* ANDERSON ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 249 Kan. 458, 819 P. 2d 1192.

No. 91–1490. MOSESIAN *v.* MCCLATCHY NEWSPAPERS, INC., ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 223 Cal. App. 3d 1685, 285 Cal. Rptr. 430.

No. 91–1492. PHILLIPS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 107 Nev. 1131, 838 P. 2d 953.

No. 91–1495. BURKHART ET UX. *v.* DAVIES ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 602 A. 2d 56.

No. 91–1498. ALTAMORE *v.* NEWSDAY, INC. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 175 App. Div. 2d 684, 573 N. Y. S. 2d 957.

No. 91–1499. JONES ET UX. *v.* MELLON BANK, N. A. Super. Ct. Pa. Certiorari denied. Reported below: 414 Pa. Super. 659, 598 A. 2d 1337.

No. 91–1501. POMINI FARREL S. P. A. ET AL. *v.* FARREL CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 949 F. 2d 1147.

No. 91–1505. GTE DIRECTORIES CORP. ET AL. *v.* YELLOW PAGES COST CONSULTANTS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1158.

No. 91–1506. TERRY *v.* M/S "BIRTE" RITSCHER KG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1393.

No. 91–1507. KOCZAK *v.* SMITH, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 937 F. 2d 618.

No. 91–1509. GULF COAST HELICOPTERS, INC., ET AL. *v.* BAY AREA BANK & TRUST. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1257.

No. 91–1510. SULLIVAN *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 946.

No. 91–1512. ROUSH *v.* ROUSH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 396.

No. 91–1516. STUART ET AL. *v.* ROACHE, POLICE COMMISSIONER OF CITY OF BOSTON, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 951 F. 2d 446.

No. 91–1520. HEART OF DIXIE NISSAN, INC., DBA DIXIE NISSAN *v.* REYNOLDS, TRUSTEE OF BANKRUPTCY ESTATE OF CAR RENOVATORS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 780.

No. 91–1532. FARNAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1283.

No. 91–1536. KRUSE ET AL. *v.* COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 950.

No. 91–1539. WIECH ET VIR *v.* FAIRFAX COUNTY DEPARTMENT OF HUMAN DEVELOPMENT. Sup. Ct. Va. Certiorari denied.

No. 91–1540. SHUMA ET AL. *v.* KEMP, TRUSTEE. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 723.

No. 91–1541. EWING ET AL. *v.* CITY OF CARMEL-BY-THE-SEA ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 234 Cal. App. 3d 1579, 286 Cal. Rptr. 382.

No. 91–1543. LONG *v.* SMYTHE, CHIEF OF POLICE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 936.

No. 91–1545. AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS *v.* TURNER BROADCASTING SYSTEM, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 21.

No. 91–1547. AHAM-NEZE *v.* SOHIO SUPPLY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 951 F. 2d 573.

No. 91–1552. COLLINS *v.* UNIFIED COURT SYSTEM OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 3.

No. 91–1557. YADAV ET UX. *v.* CHARLES SCHWAB & CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1277.

No. 91–1558. ORTEZ-MIRANDA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 405.

No. 91–1562. JEWEL FOOD STORES, A DIVISION OF JEWEL COS., INC. *v.* MERK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 945 F. 2d 889.

No. 91–1564. CITY AND COUNTY OF SAN FRANCISCO *v.* GAUDIYA VAISHNAVA SOCIETY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1059.

No. 91–1565. MABRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 127.

No. 91–1566. REPUBLICAN PARTY OF OREGON ET AL. *v.* KEISLING, SECRETARY OF STATE OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 144.

No. 91–1567. BRAILEY *v.* SECRETARY OF THE TREASURY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 352.

No. 91–1568. HESKETT ET AL. *v.* SILOAM LODGE #35 OF THE FREE AND ACCEPTED MASONS OF MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 91–1572. ASH *v.* STERNWEST CORP. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1573. HURST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 1490.

No. 91–1574. PERKINS *v.* WESTERN SURETY CO. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 891.

No. 91–1579. KRAIN *v.* NADLER ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–1588. SULLIVAN *v.* UNITED CAROLINA BANK. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 886.

No. 91–1590. FAWELL *v.* CESENA ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 145 Ill. 2d 32, 582 N. E. 2d 177.

No. 91–1598. YAMAMOTO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 731.

No. 91–1599. SCHWARMAN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 731.

No. 91–1601. LOWRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–1602. SMITH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SMITH *v.* FRELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 343.

No. 91–1621. MICHIGAN *v.* SLIGH. Ct. App. Mich. Certiorari denied.

No. 91–1623. GIBBS ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1490.

No. 91–1632. MARCUM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 928.

No. 91–1640. NELSON *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–1642. LOWERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–1649. HAUPTLI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1193.

No. 91–1651. ATRAQCHI ET UX. *v.* UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 959 F. 2d 740.

No. 91–1658. BRUMFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 91–1670. POPE *v.* MCI TELECOMMUNICATIONS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 937 F. 2d 258.

No. 91–1673. CONNORS *v.* HOWARD JOHNSON CO. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 410 Mass. 1102, 576 N. E. 2d 685.

No. 91–6358. WHITE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 584 So. 2d 1152.

No. 91–6428. MORAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1317.

No. 91–6686. CHAMBERS *v.* BUSTAMANTE ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–6963. ROOSEVELTAUSE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 209 Ill. App. 3d 772, 568 N. E. 2d 403.

No. 91–6972. DAVIS ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 10th Cir. Certiorari denied. Reported below: 940 F. 2d 1360.

No. 91–7048. CRANDALL *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 91–7103. CHAMBERLIN *v.* DEPARTMENT OF CORRECTIONS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–7122. WILSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 91–7131. MAISANO *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 499.

No. 91–7181. KEMP *v.* MOORE, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 588.

No. 91–7229. LABOUNTY *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 91–7231. EDWARDS *v.* UNITED STATES; and
No. 91–7335. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 945 F. 2d 378.

No. 91–7243. STEWART *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 91–7252. NEWMAN ET AL. *v.* ORENTREICH. Ct. App. N. Y. Certiorari denied. Reported below: 78 N. Y. 2d 857, 580 N. E. 2d 410.

No. 91–7269. CAMPUSANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 394.

No. 91–7292. AMOS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 819 S. W. 2d 156.

No. 91–7301. COPELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–7304. SOMERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1279.

No. 91–7313. KNIGHT *v.* MARICOPA COUNTY SHERIFF'S OFFICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7323. TARPLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 806.

No. 91–7337. HARLAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–7344. REYNOLDS *v.* LOCAL 24, UNITED STEEL WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 945 F. 2d 405.

No. 91–7356. MARAVILLA *v.* UNITED STATES; and
No. 91–7363. DOMINGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 951 F. 2d 412.

No. 91–7370. FELK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 589 So. 2d 905.

No. 91–7375. MAQUEIRA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 221.

No. 91–7388. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 949 F. 2d 1161.

No. 91–7397. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 292 U. S. App. D. C. 190, 948 F. 2d 782.

No. 91–7409. MANNING *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 1434, 578 N. E. 2d 825.

No. 91–7458. D'AMICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 951 F. 2d 498.

No. 91–7491. LIMEHOUSE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 501.

No. 91–7561. SCOTT *v.* VETERANS ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7566. WIGHTMAN *v.* STONE, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1542.

No. 91–7575. OLATUNJI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 941.

No. 91–7588. K. B. *v.* N. B. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 811 S. W. 2d 634.

No. 91–7595. HARRIS *v.* GRAY ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–7601. CALESHU *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 564.

No. 91–7602. GIBBS *v.* ODEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 91–7614. BROWN-EL *v.* SAMANIEGO ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–7618. COE *v.* ROWLAND. C. A. 9th Cir. Certiorari denied.

No. 91–7619. SHOWN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 91–7620. BATES *v.* GUNTER, DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 953.

No. 91–7621. COOPER *v.* MISSOURI ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 818 S. W. 2d 653.

No. 91–7622. BROWN *v.* ATTORNEY GENERAL OF MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 395.

No. 91–7624. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1256.

No. 91–7632. FRAZIER *v.* LEHMAN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7635. FEAGINS *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1391.

No. 91–7636. DAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 91–7638. WALLS *v.* COOPER ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 604 A. 2d 419.

No. 91–7653. LOWE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 648.

No. 91–7657. CARTER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 591 So. 2d 192.

No. 91–7658. JACKSON *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 400.

No. 91–7660. RAMOS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 91–7663. JONES *v.* POLL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 752.

No. 91–7665. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 729.

No. 91–7670. JONES *v.* HOWARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1264.

No. 91–7671. WINTERS *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 53.

No. 91–7673. SMITH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–7674. JOHNSON *v.* BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 792.

No. 91–7675. RANDOLPH *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 243.

No. 91–7676. ROGERS *v.* WALLIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 568.

No. 91–7677. NYBERG *v.* BELL ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 592 So. 2d 247.

No. 91–7678. LANE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 822 S. W. 2d 35.

No. 91–7679. MCDONALD *v.* NEW MEXICO PAROLE BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 631.

No. 91–7681. PATTERSON *v.* DISTRICT OF COLUMBIA COMMISSION ON HUMAN RIGHTS. Ct. App. D. C. Certiorari denied.

No. 91–7683. ROSENFELD *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 157 Vt. 537, 601 A. 2d 972.

No. 91–7684. BARONI *v.* CONRAD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1391.

No. 91–7688. SANCHEZ *v.* MANN, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 91–7689. ABDULLAH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 947 F. 2d 306.

No. 91–7690. DAVIS *v.* CARROLL COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 940.

No. 91–7694. ORGAIN *v.* ORGAIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 941.

No. 91–7695. RAMIREZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 91–7699. GUSTAFSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–7700. HANSEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 592 So. 2d 114.

No. 91–7705. GHENT *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1296.

No. 91–7706. DAVIS *v.* WALDRON ET AL. C. A. 5th Cir. Certiorari denied.

No. 91–7707. WASHINGTON *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 91–7710. FARNUM *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 566.

No. 91–7712. HAMMOND *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–7714. WALKER *v.* PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT COMMISSION. Sup. Ct. Pa. Certiorari denied. Reported below: 530 Pa. 335, 609 A. 2d 132.

No. 91–7716. CASEBOLT *v.* SUPERIOR COURT OF CALIFORNIA, VENTURA COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–7718. CHADWICK *v.* IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 863.

No. 91–7719. ADKINS *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 91–7724. REDDICK *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–7725. LEWIS *v.* BEELER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 949 F. 2d 325.

No. 91–7726. GAMBRILL *v.* TALLY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 91–7728. WILSON *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91–7729. PHILLIPS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 136 Ill. 2d 551, 567 N. E. 2d 339.

No. 91–7730. MATTHEWS *v.* RAKIEY, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 411 Mass. 1105, 586 N. E. 2d 10.

No. 91–7731. NEBOLSKY *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 213 Ill. App. 3d 1103, 621 N. E. 2d 301.

No. 91–7732. LEDBETTER *v.* CAPITOL REPORTERS ET AL.; LEDBETTER *v.* TONEY ET AL.; and LEDBETTER *v.* GRAHAM. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 407 (second and third cases).

No. 91–7734. WILSON *v.* LEE, SUPERINTENDENT, CALEDONIA CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 889.

No. 91–7735. SHORE *v.* WARDEN, STATEVILLE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 942 F. 2d 1117.

No. 91–7736. WARDLAW *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–7738. WALTON *v.* AMERICAN STEEL CONTAINER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 952 F. 2d 405.

No. 91–7740. KNIGHT *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION OF HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7741. JOHNSON *v.* GUNTER, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1294.

No. 91–7747. ABERNATHY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 934 F. 2d 1265.

No. 91–7748. AWKAKEWAKEYES *v.* DRAGOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7750. MARTS, AKA BISHOP *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–7751. PAGLIASSO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Sup. Ct. Cal. Certiorari denied.

No. 91–7752. SALAZAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 945 F. 2d 47.

No. 91–7753. MCDONALD *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7756. ALASHKAR *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–7757. WILSON *v.* PETERS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1487.

No. 91–7761. BROWN *v.* WILLIAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 395.

No. 91–7764. EVANS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–7765. HILL *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 91–7768. DIAZ *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 583 N. E. 2d 207.

No. 91–7771. PATE *v.* LISENBY ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 592 So. 2d 1092.

No. 91–7773. ZOLLICOFFER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 24, 951 F. 2d 1291.

No. 91–7776. SCOTT *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7782. QUINTANA *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 541, 606 A. 2d 358.

No. 91–7786. CIRIACO-MADRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–7791. ONOKPEVWE *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–7793. GEURIN *v.* DEPARTMENT OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 406.

No. 91–7795. CRANE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 145 Ill. 2d 520, 585 N. E. 2d 99.

No. 91–7796. HOFFMAN *v.* FREILICH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 49.

No. 91–7798. HERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7799. CASIMONO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 250 N. J. Super. 173, 593 A. 2d 827.

No. 91–7806. GLENN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 1223.

No. 91–7809. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91–7812. ALDRED *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 590 So. 2d 424.

No. 91–7815. O'CONNOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 338.

No. 91–7817. MASON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 219.

No. 91–7819. RATNAWEERA ET UX. *v.* RESOLUTION TRUST CORPORATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 362.

No. 91–7820. LUCAS *v.* ESTELLE, WARDEN, ET AL. (two cases). C. A. 9th Cir. Certiorari denied.

No. 91–7821. DARVEAUX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–7824. RAYGOZA-TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1261.

No. 91–7825. GROBMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–7828. HUNTE, AKA HINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 946 F. 2d 887.

No. 91–7834. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 91–7835. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7836. WILLIAMS *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 950 F. 2d 730.

No. 91–7837. CRABB *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 1245.

No. 91–7838. DICKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 948 F. 2d 1278.

No. 91–7842. WILBURN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–7843. MULLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 410.

No. 91–7844. LOGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1370.

No. 91–7845. STAVROULAKIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 686.

No. 91–7847. POU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 363.

No. 91–7848. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 408.

No. 91–7850. GOUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1400.

No. 91–7852. MONDEJAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 363.

No. 91–7855. MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 461.

No. 91–7857. POU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 363.

No. 91–7859. AGERTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–7863. LEVY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 274.

No. 91–7865. MEJIA-BEJARANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 91–7867. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 91–7869. REIDT *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 362.

No. 91–7874. SUI FUN HO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1257.

No. 91–7877. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 823 P. 2d 370.

No. 91–7879. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 222.

No. 91–7880. LAFOON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–7882. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 871.

No. 91–7883. LUNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 91–7884. MITCHELL, AKA JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–7885. BRADIX *v.* UNITED STATES (two cases). C. A. 9th Cir. Certiorari denied.

No. 91–7888. KIBA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

No. 91–7892. BAILEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 91–7895. CHURCH *v.* HUFFMAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 958 F. 2d 367.

No. 91–7896. MUMIT, AKA BRYANT *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1568.

No. 91–7898. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 949 F. 2d 396.

No. 91–7899. CHAPPELL *v.* UNITED STATES (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 272.

No. 91–7900. MCGHEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 949 F. 2d 1023.

No. 91–7903. BYROM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 403.

No. 91–7904. SOLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 276.

No. 91–7905. BULLOCK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 596 A. 2d 980.

No. 91–7906. TUCKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 952 F. 2d 411.

No. 91–7911. JUDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 523.

No. 91–7915. EXCELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–7919. SIMPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 443.

No. 91–7922. JOSEPH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 591 A. 2d 14.

No. 91–7928. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 1164.

No. 91–7929. KERRIDAN *v.* UNITED STATES; and
No. 91–7930. LAPORTA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 1465.

No. 91–7932. WATSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 895.

No. 91–7934. MARTES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 91–7935. COOK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 903.

No. 91–7936. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–7940. BODENSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 635.

No. 91–7941. HENTHORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 91–7944. CASTANEDA-GALLARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 1451.

No. 91–7945. BEZOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 407.

No. 91–7947. RAMIREZ-CARRANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 98.

No. 91–7948. NDUKA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 400.

No. 91–7951. BENEDETTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7952. OLIVO PEGUERO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 641.

No. 91–7958. STICKLES *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 942.

No. 91–7959. BLEECKER *v.* MURPHY. Sup. Ct. Va. Certiorari denied.

No. 91–7961. MOURSUND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–7970. KELLEY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 954 F. 2d 734.

No. 91–7971. CHRISTOPHER, AKA WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 57, 951 F. 2d 1324.

No. 91–7977. BODINE *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 951 F. 2d 1267.

No. 91–7991. CADET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–7993. CARDENAS-BARRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 933 F. 2d 1016.

No. 91–7994. CICALESE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–7999. GARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–8001. INGRAM *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 724.

No. 91–8002. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 870.

No. 91–8021. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 91–1202. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* LINDSAY, HARRIS COUNTY JUDGE, ET AL. C. A. 5th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 937 F. 2d 984.

No. 91–7152. PHILLIP *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 948 F. 2d 241.

No. 91–7687. THOMAS *v.* OHIO. Ct. App. Ohio, Montgomery County. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 91–1299. RUSCITTO *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 948 F. 2d 1286.

No. 91–1438. BROADCAST MUSIC, INC. *v.* EDISON BROTHERS STORES, INC. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 954 F. 2d 1419.

No. 91–1355. J. ARON & CO. *v.* HAVILAND. C. A. 2d Cir. Motion of Securities Industry Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 947 F. 2d 601.

No. 91–1383. ALABAMA *v.* FLOWERS. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 586 So. 2d 978.

No. 91–1491. CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICE *v.* MOORE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 904 F. 2d 1226.

No. 91–1494. GUNTER ET AL. *v.* ABDULLAH. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 949 F. 2d 1032.

No. 91–1419. GUAM HAKUBOTAN, INC. *v.* FURUSAWA INVESTMENT CORP. ET AL. C. A. 9th Cir. Motion of Ben Blaz for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 947 F. 2d 398.

No. 91–1440. SCHNABEL FOUNDATION CO. *v.* HARBOR INSURANCE CO. C. A. D. C. Cir. Motion of District of Columbia Chapter of the Federal Bar Association for leave to file a brief as *amicus curiae* granted. Motion of petitioner to seek the view of the United States denied. Certiorari denied. Reported below: 292 U. S. App. D. C. 56, 946 F. 2d 930.

No. 91–1446. BROOKS, MEMBER OF CONGRESS *v.* WILLIAMS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 945 F. 2d 1322.

No. 91–1481. BACH ET AL. *v.* TRIDENT STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Motion of American Trial Lawyers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 947 F. 2d 1290.

No. 91–1482. WOODS *v.* AT&T INFORMATION SERVICES, INC., ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 951 F. 2d 1262.

No. 91–1542. FANTASY, INC., DBA JONDORA/PARKER MUSIC *v.* MARASCALCO, DBA ROBIN HOOD MUSIC. C. A. 9th Cir. Motion of Twentieth Century Fox Film Corp. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 953 F. 2d 469.

No. 91–1555. NATIONAL ADVERTISING CO. *v.* CITY OF RALEIGH, NORTH CAROLINA. C. A. 4th Cir. Motion of respondent to withdraw its consent to the filing of *amicus curiae* brief by Defenders of Property Rights denied. Certiorari denied. Reported below: 947 F. 2d 1158.

No. 91–1556. COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA *v.* CITY OF SACRAMENTO ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 941 F. 2d 872.

No. 91–6801. ALONZO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 938 F. 2d 1431.

No. 91–7051. FEIJOO TOMALA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 946 F. 2d 883.

JUSTICE WHITE, with whom JUSTICE THOMAS joins, dissenting.

The issue in this case is whether the trial court erred in instructing a jury that petitioner could be convicted for importing illegal drugs if she consciously avoided knowledge that drugs were concealed in a suitcase she was carrying.

Petitioner, who had just arrived from Ecuador with her two young daughters, was arrested at Kennedy International Airport when a Customs inspector found three kilograms of cocaine in a hidden compartment of a suitcase. She was charged with importing cocaine into the United States in violation of 21 U. S. C. § 952(a). At trial, petitioner defended on the theory that she had been unwittingly duped into serving as a drug courier. She testified that a woman had approached her at the Ecuador airport, identified herself as Maria Alcivar, and asked her to deliver the suitcase to Alcivar's sister, Georgina de Rodrigues. The woman opened the suitcase to show petitioner that it contained several new dresses and explained that she was returning the dresses to her sister because she had been unable to sell them in Ecuador. She provided petitioner with an incomplete New Jersey address and a telephone number, which had a New Jersey area code followed by an eight-digit number.

The trial court charged the jury that the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she possessed narcotics. But the court added:

> "'[I]t is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics.'" Brief for United States 6.

Petitioner's first trial ended in a hung jury. On retrial, she was convicted and sentenced to 60 months' imprisonment. The Court of Appeals for the Second Circuit affirmed. 946 F. 2d 883 (1991) (judgment order).

Petitioner contends that the trial court erred in giving the instruction quoted above because the Government had not argued

that she consciously avoided knowledge that she was transporting drugs and because the instruction allows a conviction on the basis of recklessness or negligence, thereby vitiating the statutory requirement that the Government prove petitioner acted knowingly. She urges that the outcome of her case would have been different had she been tried in another circuit. The Government concedes as much, citing conflicting decisions by the Courts of Appeals for the Ninth and Tenth Circuits, and suggests that we grant certiorari. See *United States* v. *De Francisco-Lopez*, 939 F. 2d 1405 (CA10 1991); *United States* v. *Sanchez-Robles*, 927 F. 2d 1070 (CA9 1991).

I agree with petitioner and the Government that the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried. I therefore would grant certiorari to resolve the conflict in the Courts of Appeals.

No. 91–7169. FOWNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 947 F. 2d 954.

JUSTICE WHITE, dissenting.

This case presents the question whether the weight of uningestible waste material should be included in calculating the weight of a "mixture or substance" containing a detectable amount of a controlled substance for purposes of § 2D1.1 of the United States Sentencing Commission, Guidelines Manual (Nov. 1992). Petitioner was arrested in possession of 79.7 grams of methamphetamine, as well as approximately 24 gallons of a liquid mixture containing detectable amounts of a controlled substance. At trial, an expert testified that the liquid was a waste byproduct of methamphetamine manufacturing. Petitioner claims that his sentence should not have been based on the entire weight of the 24 gallons of liquid because it is an uningestable waste. In the decision below, the Court of Appeals for the Tenth Circuit held that it was unnecessary to make a determination whether the liquid was waste and intended to be discarded. Following Tenth Circuit precedent, the Court of Appeals held that so long as the liquid contained a detectable amount of a controlled substance, its entire weight was properly included in the calculation of the defendant's sentence under the Guidelines. See also *United States* v. *Dorrough*, 927 F. 2d 498 (CA10 1991); *United States* v. *Callihan*, 915 F. 2d 1462, 1463 (CA10 1990).

Several Courts of Appeals have followed a different rationale, holding that sentencing calculations may not be based on the total weight of mixtures containing uningestable "waste" material. In *United States* v. *Rolande-Gabriel*, 938 F. 2d 1231 (CA11 1991), the defendant had been arrested in possession of a liquid substance containing cocaine base, a cutting agent, and liquid waste. The Court of Appeals there noted that the liquid waste did not facilitate the use, marketing, or access of the drug, and concluded that its use in sentencing calculations was irrational. *Id.*, at 1237. The Court of Appeals therefore held that the weight of unusable waste material should not be used for sentencing purposes. Similarly, in *United States* v. *Jennings*, 945 F. 2d 129 (1991), the Court of Appeals for the Sixth Circuit ruled that it would be inappropriate to sentence defendants on the basis of the entire weight of an undistributable methamphetamine "cooking" mixture containing a small amount of methamphetamine mixed with poisonous unreacted chemicals and byproducts. See also *United States* v. *Touby*, 909 F. 2d 759, 773 (CA3 1990) (suggesting that, while weight of cutting ingredients may properly be included in sentencing calculation, weight of unconsumable manufacturing byproducts may not), aff'd on other grounds, 500 U. S. 160 (1991).

Several other Courts of Appeals, like the court below, have taken a contrary approach. In *United States* v. *Mahecha-Onofre*, 936 F. 2d 623 (CA1), cert. denied, 502 U. S. 1009 (1991), cocaine had been chemically bonded to the acrylic material of which two suitcases were constructed. When calculating the defendant's sentence, the District Court included the total weight of the suitcases, minus all metal parts. 936 F. 2d, at 625. The Court of Appeals noted that, unlike blotter paper or cutting agents, the suitcase material obviously could not be consumed and that the cocaine had to be separated from the suitcase material before it could be used; however, the court held, this distinction did not make a difference for sentencing purposes. *Id.*, at 626. Similarly, in *United States* v. *Beltran-Felix*, 934 F. 2d 1075 (1991), cert. denied, 502 U. S. 1065 (1991), the Court of Appeals for the Ninth Circuit held that, for purposes of sentencing under 21 U. S. C. § 841(b)(1)(B), a solution containing methamphetamine need not be a "marketable mixture" in a distributable state. In *United States* v. *Baker*, 883 F. 2d 13 (1989), the Court of Appeals for the Fifth Circuit followed an analogous course. Although most of a liquid containing methamphetamine was waste material,

the Court of Appeals upheld the use of the weight of the whole solution for sentencing purposes. *Id.*, at 14, 15.

The issue is a recurring one. Because of the conflict, identical conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country. I would grant certiorari to resolve this conflict.

Rehearing Denied

No. 90–1150. WILLY *v.* COASTAL CORP. ET AL., 503 U. S. 131;

No. 91–122. PFZ PROPERTIES, INC. *v.* RODRIGUEZ ET AL., 503 U. S. 257;

No. 91–756. WHITMER ET UX. *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL., 502 U. S. 1033;

No. 91–1095. BINKLEY ET AL. *v.* CATERPILLAR, INC., 503 U. S. 926;

No. 91–1174. MEYERS *v.* KALLESTEAD, DBA BETTE MOM'S TAVERN, 503 U. S. 920;

No. 91–1175. MORGAN *v.* COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES ET AL., 503 U. S. 937;

No. 91–1216. SUTHERLAND *v.* SUTHERLAND, 503 U. S. 952;

No. 91–1220. VIEHWEG *v.* DEVEREUX, 503 U. S. 927;

No. 91–1228. CSOKA *v.* WALDEN ET AL., 503 U. S. 938;

No. 91–1287. IRBY ET UX. *v.* UNITED STATES, 503 U. S. 939;

No. 91–1290. SCHWARZER *v.* DOUGLAS COUNTY, NEVADA, 503 U. S. 960;

No. 91–1389. VIGIL *v.* SOLANO ET AL., 503 U. S. 961;

No. 91–6160. HENTHORN *v.* UNITED STATES; and LAWRENCE *v.* UNITED STATES, 503 U. S. 972;

No. 91–6211. BELL *v.* CITY AND COUNTY OF DENVER, 502 U. S. 1016;

No. 91–6454. ALLEN *v.* MADIGAN, SECRETARY OF AGRICULTURE, 502 U. S. 1102;

No. 91–6538. IN RE JARRETT, 502 U. S. 1070;

No. 91–6633. WILLIAMS *v.* OFFICE OF PERSONNEL MANAGEMENT, 503 U. S. 941;

No. 91–6668. LEWIS *v.* RUSSE ET AL., 503 U. S. 921;

No. 91–6850. EDDMONDS *v.* ILLINOIS, 503 U. S. 942;

No. 91–7022. MURRAY *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 503 U. S. 911;

No. 91–7033. FRESQUEZ *v.* CALIFORNIA, 503 U. S. 922;

No. 91–7035. KEYES *v.* HUCKLEBERRY HOUSE ET AL., 503 U. S. 922;

No. 91–7101. MONTGOMERY *v.* UNIVERSITY OF CHICAGO ET AL., 503 U. S. 944;

No. 91–7171. JUSTICE *v.* LTV STEEL CO., INC., FOR ITSELF AND AS SUCCESSOR TO REPUBLIC STEEL CORP., ET AL., 503 U. S. 946;

No. 91–7172. HUFFSMITH *v.* WYOMING COUNTY PRISON BOARD ET AL., 503 U. S. 946;

No. 91–7182. KEYES *v.* HUCKLEBERRY HOUSE ET AL.; and KEYES *v.* MCISSAC, CHIEF PROBATION OFFICER, CITY AND COUNTY OF SAN FRANCISCO, 503 U. S. 962;

No. 91–7205. GALLARDO *v.* UNITED STATES, 503 U. S. 923;

No. 91–7207. CONNER *v.* INDIANA, 503 U. S. 946;

No. 91–7256. IN RE COX, 503 U. S. 935;

No. 91–7278. VALLADARES *v.* TEXAS, 503 U. S. 964;

No. 91–7366. JOHNSON *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS, 503 U. S. 990;

No. 91–7428. IN RE JOHNS, 503 U. S. 935; and

No. 91–7511. IN RE ZZIE, 503 U. S. 958. Petitions for rehearing denied.

No. 91–654. CAFARO *v.* NEW YORK, 502 U. S. 1005 and 1124. Motion for leave to file second petition for rehearing denied.

No. 91–786. CLARKE *v.* LOMA LINDA FOODS, INC., ET AL., 502 U. S. 1034. Petition for rehearing denied. JUSTICE BLACKMUN would grant this petition.

No. 91–1341. THANH VONG HOAI ET AL. *v.* THANH VAN VO ET AL., 503 U. S. 967. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

No. 91–6693. FISHER *v.* ALABAMA, 503 U. S. 941. Petition for rehearing denied. JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE KENNEDY would call for a response to the petition for rehearing.

MAY 19, 1992

Miscellaneous Order

No. A–854 (91–7914). ROMERO *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented

to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE O'CONNOR would grant the application for stay of execution.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE KENNEDY join, dissenting.

In *Graham* v. *Collins*, 950 F. 2d 1009 (1992) (en banc), cert. pending, No. 91–7580, the Court of Appeals for the Fifth Circuit rejected the claim advanced by the petitioner in this case by a vote of 7 to 6. Obviously, the claim cannot be frivolous. At its Conference on May 29, the Court will consider the petition for certiorari in *Graham*, along with two other petitions raising the same claim. In my opinion it is unseemly not to stay petitioner's execution until after that time so that his application and petition receive at least the same consideration as will be given to those whose petitions for certiorari are now pending on the Conference list. Accordingly, I respectfully dissent.

MAY 20, 1992

Miscellaneous Order. (See also No. A–877, *ante*, p. 188.)

No. A–874. ROMERO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE KENNEDY would grant the application for stay of execution.

MAY 21, 1992

Miscellaneous Orders

No. A–885 (91–8341). BLACK *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant the application for stay of execution pending the disposition of the petition for writ of certiorari.

No. A–887 (91–8361). BLACK *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUS-

TICE O'CONNOR would grant the application for stay of execution pending the disposition of the petition for writ of certiorari.

MAY 26, 1992

Affirmed on Appeal

No. 91–1514. ANNE ARUNDEL COUNTY REPUBLICAN CENTRAL COMMITTEE ET AL. *v.* STATE ADMINISTRATIVE BOARD OF ELECTION LAWS ET AL. Affirmed on appeal from D. C. Md. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 781 F. Supp. 394.

Miscellaneous Orders

No. D–1084. IN RE DISBARMENT OF GREENSPAN. Disbarment entered. [For earlier order herein, see 502 U. S. 1087.]

No. D–1085. IN RE DISBARMENT OF KENNEY. Disbarment entered. [For earlier order herein, see 503 U. S. 902.]

No. D–1090. IN RE DISBARMENT OF GARNER. Disbarment entered. [For earlier order herein, see 503 U. S. 903.]

No. D–1091. IN RE DISBARMENT OF CRABTREE. Disbarment entered. [For earlier order herein, see 503 U. S. 916.]

No. D–1092. IN RE DISBARMENT OF DEVINE. Disbarment entered. [For earlier order herein, see 503 U. S. 916.]

No. D–1093. IN RE DISBARMENT OF ROBBINS. Disbarment entered. [For earlier order herein, see 503 U. S. 916.]

No. D–1095. IN RE DISBARMENT OF O'BRYAN. Disbarment entered. [For earlier order herein, see 503 U. S. 932.]

No. D–1126. IN RE DISBARMENT OF MARTIN. It is ordered that John T. Martin, of Springfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1127. IN RE DISBARMENT OF WHITNALL. It is ordered that William Dalton Whitnall, of Ripon, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1128. IN RE DISBARMENT OF RODRIGUEZ. It is ordered that Carlos Alberto Rodriquez, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE *v.* NEW YORK. Fee application dated March 27, 1992, submitted by the Special Master in this action approved, and payment shall be made to "Thomas H. Jackson, Special Master" in the total amount of $105,824.85. It is further ordered that the participating jurisdictions shall bear these costs equally, with each jurisdiction which is a party or which has a pending application to intervene at the date of this order contributing an equal share. It is further ordered that each such jurisdiction may make payment either to the firm of Dickstein, Shapiro & Morin, as coordinating counsel for this purpose, or may make payment directly or via separate counsel to the Special Master. It is further ordered that payment of fees, costs, and expenses pursuant to this order shall be due within 45 days from the date hereof. [For earlier order herein, see, *e. g.*, 502 U. S. 1088.]

No. 91–32. SORBOTHANE, INC., ET AL. *v.* MCQUILLAN ET VIR, DBA SORBOTURF ENTERPRISES. C. A. 9th Cir. Motion of respondents to expedite consideration of petition for writ of certiorari denied. JUSTICE BLACKMUN would grant this motion.

No. 91–1270. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* TERRAZAS ET AL. Appeal from D. C. W. D. Tex. Motion of potential intervenors Guadalupe Mena et al. for leave to proceed *in forma pauperis* granted. Motion of Guadalupe Mena et al. for leave to intervene denied.

No. 91–7497. RUSSELL *v.* FRANK, POSTMASTER GENERAL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 16, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Certiorari Granted

No. 91–1229. UNITED STATES BY AND THROUGH INTERNAL REVENUE SERVICE *v.* MCDERMOTT ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 945 F. 2d 1475.

No. 91–1300. UNITED STATES *v.* DUNNIGAN. C. A. 4th Cir. Certiorari granted. Reported below: 944 F. 2d 178.

No. 91–1594. EDENFIELD ET AL. *v.* FANE. C. A. 11th Cir. Certiorari granted. Reported below: 945 F. 2d 1514.

No. 91–904. CONCRETE PIPE & PRODUCTS OF CALIFORNIA, INC. *v.* CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA. C. A. 9th Cir. Certiorari granted limited to Questions 2 and 4 presented by the petition. Reported below: 936 F. 2d 576.

Certiorari Denied

No. 91–1233. ZARZECKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 937 F. 2d 823 and 946 F. 2d 188.

No. 91–1376. CHURCH OF SCIENTOLOGY INTERNATIONAL ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (AZNARAN ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 91–1399. UTE DISTRIBUTION CORP. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 938 F. 2d 1157.

No. 91–1404. AMEJI *v.* COWAN, ATTORNEY GENERAL OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 943 F. 2d 51.

No. 91–1422. HOBBS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 947 F. 2d 941.

No. 91–1544. KRASNIQI *v.* DALLAS COUNTY CHILD PROTECTIVE SERVICES UNIT OF THE TEXAS DEPARTMENT OF HUMAN SERVICES. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 809 S. W. 2d 927.

No. 91–1575. THOMPSON *v.* KRAMER. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 935.

No. 91–1576. LEVENE ET AL. *v.* PINTAIL ENTERPRISES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 943 F. 2d 528.

No. 91–1578. TOMCZYK *v.* BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 771.

No. 91–1580. TOWER *v.* NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 242 Va. 357, 411 S. E. 2d 1.

No. 91–1583. KINSEY *v.* SALADO INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 988.

No. 91–1584. RIMELL ET VIR *v.* MARK TWAIN BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 1363.

No. 91–1585. THOMPSON ET VIR *v.* PEOPLES LIBERTY BANK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 940 F. 2d 662.

No. 91–1591. OSEI-AFRIYIE *v.* MEDICAL COLLEGE OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1393.

No. 91–1605. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 232.

No. 91–1606. ZURAK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 168 App. Div. 2d 196, 571 N. Y. S. 2d 577.

No. 91–1614. INDUSTRIAL RISK INSURERS *v.* COTTON BROTHERS BAKING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 941 F. 2d 380 and 951 F. 2d 54.

No. 91–1622. GREGORY ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 942 F. 2d 1498.

No. 91–1627. MITCHELL ET UX., AS NEXT FRIENDS FOR MITCHELL, A MINOR *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 1487.

No. 91–1635. RENZ *v.* EAGLE ASSOCIATES ET AL. Ct. App. Kan. Certiorari denied. Reported below: 15 Kan. App. 2d xxxiii, 815 P. 2d 128.

No. 91–1660. BRENNEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 91–1664. DYKES *v.* NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 242 Va. 357, 411 S. E. 2d 1.

No. 91–1684. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 37.

No. 91–1713. ZUMBO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 91–6462. VAN HORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 942 F. 2d 787.

No. 91–6627. MALANDRINI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 91–6876. EDWARDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 144 Ill. 2d 108, 579 N. E. 2d 336.

No. 91–6943. MILLSAPS *v.* MASTERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 945.

No. 91–7129. PERDOMO RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1100.

No. 91–7448. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 635.

No. 91–7462. SALGADO-ARISTIZABEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 729.

No. 91–7463. UBRI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–7469. AGU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 949 F. 2d 63.

No. 91–7516. ORTIZ-MORILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1264.

No. 91–7654. RICH *v.* UNITED STATES; and
No. 91–7907. HOOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 1158.

No. 91–7792. CORONEL *v.* COMMISSIONER, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 965 F. 2d 1063.

No. 91–7803. BARBER *v.* VOSE, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 91–7805. TAYLOR *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 878.

No. 91–7807. HOWARD *v.* RILEY, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–7808. ISENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 938.

No. 91–7810. BOYE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 91–7811. WEST *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 594 So. 2d 285.

No. 91–7813. BOLDEN *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 807.

No. 91–7822. KELLEY ET AL. *v.* FRYE. Sup. Ct. N. C. Certiorari denied. Reported below: 330 N. C. 441, 412 S. E. 2d 71.

No. 91–7823. SINDRAM *v.* ROTH. Ct. App. D. C. Certiorari denied.

No. 91–7827. CARPENTER *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 91–7829. BRADFORD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 721.

No. 91–7830. GOOCH, FKA VIGORITA *v.* VIGORITA. Sup. Ct. N. J. Certiorari denied. Reported below: 127 N. J. 554, 606 A. 2d 367.

No. 91–7840. FARMER *v.* GROOSE ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–7841. BLANCO *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 943 F. 2d 1477.

No. 91–7856. DANIELSON *v.* ROSZKOWSKI. C. A. 7th Cir. Certiorari denied. Reported below: 958 F. 2d 374.

No. 91–7860. MCCOY *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 1252.

No. 91–7862. CASWELL *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 853.

No. 91–7868. SINDRAM *v.* SAXTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–7870. MCLAURIN *v.* NORTHLAND SECURITY POLICE DETAIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–7871. MCLAURIN *v.* NORTHLAND SECURITY POLICE DETAIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–7875. HULL *v.* PARKER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1289.

No. 91–7878. HAMPSON *v.* BOARD OF EDUCATION, THORNTON FRACTIONAL TOWNSHIP HIGH SCHOOLS, DISTRICT 215, COOK COUNTY, ILLINOIS, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 215 Ill. App. 3d 817, 576 N. E. 2d 54.

No. 91–7955. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 91–7965. CASEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 892.

No. 91–7966. ATKINS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 91–7967. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 955 F. 2d 498.

No. 91–7986. COLLINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 957 F. 2d 72.

No. 91–7987. UPSHAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 271.

No. 91–7989. WICKSTROM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 1381.

No. 91–7996. BAILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 725.

No. 91–8004. PRECIADO-LEON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 91–8012. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 953 F. 2d 1482.

No. 91–8015. WRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 406.

No. 91–8026. BECAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 386.

No. 91–8030. LUETH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–8033. HELMY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 988.

No. 91–8035. CRUMITY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–8039. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–8044. DANIELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91–8047. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 847.

No. 91–8055. ARMENDARIZ-MATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 151.

No. 91–8057. MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 643.

No. 91–8061. CHRISTENSON *v.* MICHIGAN. Cir. Ct. Montcalm County, Mich. Certiorari denied.

No. 91–8063. CHUKWUBIKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 209.

No. 91–8065. GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 176.

No. 91–8066. KURASHIGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1389.

No. 91–8068. CONEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–8069. NUNEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 919.

No. 91–8089. VASQUEZ *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–1382. SHUBERT ORGANIZATION, INC., ET AL. *v.* LANDMARKS PRESERVATION COMMISSION OF THE CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motions of Real Estate Board of New York, Inc., and Pacific Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 166 App. Div. 2d 115, 570 N. Y. S. 2d 504.

No. 91–1417. SINGLETARY, SECRETARY, DEPARTMENT OF CORRECTIONS OF FLORIDA *v.* BLANCO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 943 F. 2d 1477.

No. 91–1595. GLASSER *v.* A. H. ROBINS CO., INC., ET AL. C. A. 4th Cir. Motion of Dalkon Shield Alliance for Justice for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 950 F. 2d 147.

No. 91–1597. PENNSYLVANIA *v.* CHAMBERS. Sup. Ct. Pa. Motion of Institute in Basic Life Principles for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 528 Pa. 558, 599 A. 2d 630.

No. 91–6658. KINDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 362.

JUSTICE WHITE, dissenting.

Petitioner Larry Kinder presents three issues related to his guilty plea and sentence for conspiring to possess methamphetamine with intent to distribute: (1) the burden of proof at the sentencing hearing; (2) District Court reliance on conduct made

the basis of counts dismissed pursuant to a plea bargain; and (3) Fifth Amendment self-incrimination implications of the acceptance of responsibility guideline, United States Sentencing Commission, Guidelines Manual §3E1.1 (Nov. 1992) (USSG). The Courts of Appeals have come into conflict on each of these issues, which reflect important and recurring problems in procedures under the Sentencing Guidelines. For the following reasons, I would grant the petition for certiorari as to each of these issues.

Petitioner was arrested following an undercover investigation into major methamphetamine dealers in the area of Waco, Texas. During the operation, petitioner expressed to an undercover officer that he had not wanted to buy a large amount "'because he had 17 ounces of methamphetamine on the street and had not collected all of the money from the sale of [it].'" 946 F. 2d 362, 365 (CA5 1991). Instead, petitioner, with the assistance of his brother, David,[1] purchased approximately one-half pound (269 grams) of methamphetamine. Following his arrest, petitioner pleaded guilty to a one-count indictment of conspiring to possess more than 100 grams of methamphetamine with intent to distribute. 21 U. S. C. §§846 and 841(a)(1). In exchange for the plea, the Government promised not to prosecute him for any additional offenses. At sentencing, however, when calculating the base offense level, the District Court included, upon recommendation by the Government, the noncharged 17 ounces (481.93 grams) of methamphetamine of which petitioner had spoken. The District Court also declined to grant petitioner a downward adjustment for acceptance of responsibility, in part because he refused to admit to possession of this additional methamphetamine.

A

Before the Fifth Circuit, petitioner asserted that, when including the noncharged amounts of methamphetamine as relevant conduct which raised his base offense level from 26 to 30 points, the District Court relied on evidence lacking sufficient indicia of reliability to meet the dictates of due process. See *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948); USSG §6A1.3(a), p. s. (resolution of disputed factors requires information with "sufficient indicia of

[1] David Kinder's petition for certiorari, No. 91–6659, presented the same issues raised by his brother here, and was denied on April 20, 1992, 503 U. S. 987.

reliability to support its probable accuracy"). Petitioner argued that his statement was mere "puffery" that lacked corroboration, emphasizing that he made such statements only to engender confidence in his distribution capabilities.

Like most Courts of Appeals, the Fifth Circuit requires district courts to determine their factual findings at sentencing by a preponderance of the evidence, which findings are reviewed on appeal solely for clear error. *United States* v. *Angulo*, 927 F. 2d 202, 205 (1991); see also *United States* v. *Blanco*, 888 F. 2d 907, 909 (CA1 1989); *United States* v. *Guerra*, 888 F. 2d 247, 250–251 (CA2 1989), cert. denied, 494 U. S. 1090 (1990); *United States* v. *Urrego-Linares*, 879 F. 2d 1234, 1237–1238 (CA4), cert. denied, 493 U. S. 943 (1989); *United States* v. *Carroll*, 893 F. 2d 1502, 1506 (CA6 1990); *United States* v. *White*, 888 F. 2d 490, 499 (CA7 1989); *United States* v. *Frederick*, 897 F. 2d 490, 491–493 (CA10), cert. denied, 498 U. S. 863 (1990); *United States* v. *Alston*, 895 F. 2d 1362, 1372–1373 (CA11 1990). However, at least one Circuit has held, *United States* v. *Kikumura*, 918 F. 2d 1084, 1098–1102 (CA3 1990), and two have suggested, *United States* v. *Townley*, 929 F. 2d 365, 369–370 (CA8 1991); *United States* v. *Restrepo*, 946 F. 2d 654, 661, n. 12 (CA9 1991) (en banc), cert. denied, 503 U. S. 961 (1992); *Restrepo*, 946 F. 2d, at 661–663 (Tang, J., concurring), *id.*, at 664–679 (Norris, J., dissenting), that a clear-and-convincing-evidence standard is appropriate when the relevant conduct offered at sentencing would dramatically increase the sentence.[2] Cf. *id.*, at 663–664 (Pregerson, J., dissenting) (advocating beyond-reasonable-doubt standard). However, even these Circuits recognize that the preponderance standard ordinarily pertains. See *United States* v. *McDowell*, 888 F. 2d 285, 290–291 (CA3 1989); *United States* v. *Sleet*, 893 F. 2d 947, 949 (CA8 1990); *United States* v. *Wilson*, 900 F. 2d 1350, 1353–1354 (CA9 1990).

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[2] Whether any Circuit would consider petitioner's heightened exposure here "dramatic" is open to question. Petitioner had a criminal history category of IV. Brief in Opposition 4. Looking only to the increase in the unadjusted base offense level from 26 to 30 shows an increase in his Guideline range from 92–115 to 135–168 months of imprisonment. In real terms, then, the District Court's acceptance of the controverted statement as probative evidence for sentencing purposes exposed petitioner to roughly four additional years' imprisonment—a 50% increase. Cf. *United States* v. *Kikumura*, 918 F. 2d 1084, 1102 (CA3 1990) (12-fold, 330-month departure from the median of an applicable Guideline range).

In a marginal case, such a difference in the standard of review could well prove dispositive, especially where, as in the Fifth Circuit, "[a] defendant who objects to the use of information bears the burden of proving that it is 'materially untrue, inaccurate or unreliable.'" 946 F. 2d, at 366 (quoting *Angulo*, *supra*, at 205). The Sentencing Guidelines do not explicitly adopt a standard of proof required for relevant conduct, and we have not visited this issue since its new procedures took effect in November 1987. See *McMillan* v. *Pennsylvania*, 477 U. S. 79, 91–93 (1986) (preponderance standard for sentencing enhancements satisfies due process). The burden of proof at sentencing proceedings is an issue of daily importance to the district courts, with implications for all sentencing findings, whether they be the base offense level, specific offense characteristics, or any adjustments thereto, or even to those facts found to warrant departure altogether. The resolution of disputed matters at sentencing obviously has serious implications for both the defendant and the Government, as it controls the length of sentence actually to be imposed. I would grant certiorari to clarify the applicable standards under the new sentencing regime.

B

Petitioner also argued that the Government violated his plea agreement not to prosecute him for additional offenses by recommending inclusion of the additional 17 ounces of methamphetamine in sentencing.[3] The Fifth Circuit rejected this argument, finding the Government to have kept its promise by *prosecuting* only the 269 grams involved in the actual sale. "Inclusion of the other 17 ounces in sentencing," the Fifth Circuit held, "is not equivalent to prosecution." 946 F. 2d, at 367 (citing *United States* v. *Rodriguez*, 925 F. 2d 107, 112 (CA5 1991)); see also *United States* v. *Kim*, 896 F. 2d 678, 684 (CA2 1990); *United States* v. *Frierson*, 945 F. 2d 650, 654–655 (CA3 1991), cert. denied, 503 U. S. 952 (1992); *United States* v. *Smallwood*, 920 F. 2d 1231,

[3] Petitioner's plea bargain in pertinent part stated: "'In exchange for Defendant's plea, the United States Attorney agrees to refrain from prosecuting Defendant for other Title 21, United States Code, violations of which the United States is now aware, which may have been committed by the Defendant in the Western District of Texas. That is, this action now pending is the extent of the Federal prosecution against the Defendant in the Western District of Texas based upon all facts at hand.'" Pet. for Cert. 15 (emphasis omitted).

1239–1240 (CA5), cert. denied, 501 U. S. 1238 (1991); *United States* v. *Jimenez*, 928 F. 2d 356, 363–364 (CA10), cert. denied, 502 U. S. 854 (1991); *United States* v. *Salazar*, 909 F. 2d 1447, 1448–1449 (CA10 1990); *United States* v. *Scroggins*, 880 F. 2d 1204, 1212–1214 (CA11 1989). The Fifth Circuit also rejected petitioner's argument that the Government misrepresented that his base offense level would be based only on 269 grams, finding instead that the guilty plea was voluntary because the District Court informed him of the maximum possible statutory punishment he faced. 946 F. 2d, at 367 (citing *United States* v. *Pearson*, 910 F. 2d 221, 223 (CA5 1990), cert. denied, 498 U. S. 1093 (1991)). To the contrary, the Ninth Circuit has several times held that the Government may not introduce counts dismissed as part of a plea bargain in order to increase the sentence. *United States* v. *Faulkner*, 952 F. 2d 1066, 1069–1071 (1991); *United States* v. *Fine*, 946 F. 2d 650, 651–652 (1991); *United States* v. *Castro-Cervantes*, 927 F. 2d 1079, 1081–1082 (1991).

The issue is of considerable importance. Petitioner pleaded guilty to conspiring to possess more than 100 grams of methamphetamine with intent to distribute, and with that plea he could expect a mandatory minimum sentence of 10 years' imprisonment, with the possibility of a life term. 21 U. S. C. § 841(b)(1)(A)(viii) (1988 ed., Supp. II). As to this substantive count of conviction, there is no distinction to be drawn between 269 grams and 751 grams of methamphetamine. But as to sentencing, the distinction is of the utmost importance, because *where* the exact sentence will fall between 10 years and life depends largely on the base offense level, USSG § 2D1.1(a)(3), which derives *solely* from the amounts listed in the Drug Quantity Table. Compare § 2D1.1(c)(7) (base offense level 30 for "[a]t least 700 G but less than 1 KG of Methamphetamine") with § 2D1.1(c)(9) (base offense level 26 for "[a]t least 100 G but less than 400 G of Methamphetamine"). The question is whether a plea bargain that deletes conduct from the offense of conviction nevertheless permits that conduct to be fully punished in the sentence for the conviction from which the conduct was supposedly deleted. Because this substantial issue frequently recurs, and because of the apparent conflict in the Circuits, I would grant certiorari on this issue as well.

C

Finally, petitioner argued that the District Court erred in refusing to reduce his base offense level for acceptance of responsibility. See USSG §3E1.1. The Fifth Circuit affirmed the District Court, finding, *inter alia*, that he "ha[s] denied [his] culpability for any criminal conduct beyond the specific offense charged," and specifically that he "continue[s] to deny any involvement in the extra 17 ounces." 946 F. 2d, at 367. Petitioner protests that requiring him to admit to incriminating conduct abridges the protections of the Fifth Amendment. The Fifth Circuit has disagreed with this assertion, see *United States* v. *Mourning*, 914 F. 2d 699, 706–707 (1990), as have the Fourth and Eleventh Circuits, see *United States* v. *Gordon*, 895 F. 2d 932, 936–937 (CA4), cert. denied, 498 U. S. 846 (1990); *United States* v. *Henry*, 883 F. 2d 1010, 1011–1012 (CA11 1989). Firmly to the contrary are the First, Second, and Ninth Circuits, which have determined that conditioning the acceptance of responsibility reduction on confession of uncharged conduct denies the defendant his right against self-incrimination. *United States* v. *Perez-Franco*, 873 F. 2d 455 (CA1 1989); *United States* v. *Oliveras*, 905 F. 2d 623 (CA2 1990); *United States* v. *Piper*, 918 F. 2d 839, 840–841 (CA9 1990). See also *United States* v. *Frierson*, *supra* (§3E1.1 implicates Fifth Amendment protections, but defendant must invoke the privilege and not simply lie in response to questioning regarding related conduct); *United States* v. *Rogers*, 899 F. 2d 917, 924 (CA10) (dictum approving *Perez-Franco*), cert. denied, 498 U. S. 839 (1990).

Amendments to this Guideline have not mended the split between the Circuits. Cf. *Braxton* v. *United States*, 500 U. S. 344 (1991). In any event, this is not a question of the mere application or simple interpretation of this Guideline, but is instead a recurring issue of constitutional dimension, where the varying conclusions of the Courts of Appeals determine the length of sentence actually imposed. I would also grant certiorari on this issue.

No. 91–7470. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 951 F. 2d 586.

Rehearing Denied

No. 91-1145. CAMPBELL *v.* DONDERO ET AL., 503 U. S. 983;
No. 91-1453. HOANG *v.* SIMS ET AL., 503 U. S. 986;
No. 91-5707. GAGE *v.* BORG, WARDEN, 502 U. S. 944;
No. 91-6446. BANKS *v.* CALIFORNIA, 502 U. S. 1045;
No. 91-6682. JEFFRESS *v.* JEFFRESS, 503 U. S. 961;
No. 91-6886. ABATE *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL., 503 U. S. 942;
No. 91-6927. REID *v.* CITY OF FLINT, 502 U. S. 1116;
No. 91-6944. NABKEY *v.* PECKERAL ET AL., 503 U. S. 909;
No. 91-7175. ROSS *v.* DAKOTA RAIL, INC., ET AL., 503 U. S. 962;
No. 91-7186. JONES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 503 U. S. 973;
No. 91-7211. CORDLE *v.* SQUARE D CO., 503 U. S. 963;
No. 91-7283. YOUNG *v.* UNITED STATES, 503 U. S. 964;
No. 91-7294. GAMBLE *v.* WEBSTER, ATTORNEY GENERAL OF MISSOURI, 503 U. S. 974; and
No. 91-7455. SOLIS *v.* TEXAS, 503 U. S. 992. Petitions for rehearing denied.

No. 91-6122. WHITAKER *v.* UNITED STATES, 502 U. S. 1076. Motion for leave to file petition for rehearing denied.

JUNE 1, 1992

Affirmed on Appeal

No. 91-1615. TURNER ET AL. *v.* ARKANSAS ET AL. Affirmed on appeal from D. C. E. D. Ark. JUSTICE WHITE and JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 784 F. Supp. 553 and 585.

Certificate Dismissed

No. 91-1841. IN RE SLAGLE. C. A. 5th Cir. Certificate dismissed. See this Court's Rule 19.3; *Wisniewski* v. *United States*, 353 U. S. 901 (1957). Reported below: 961 F. 2d 513.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, regarding dismissal.

In dismissing the certificate of question from the Court of Appeals, the Court expresses no opinion whether a petition for mandamus to compel disqualification of an individual member of a three-judge court who has denied a motion to disqualify himself

lies in the United States Court of Appeals or in this Court. I think it evident that the Court of Appeals has jurisdiction in such a situation. Our cases have indicated that we narrowly view our appellate jurisdiction in three-judge court cases pursuant to 28 U. S. C. § 1253. See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 96 (1974). We have thus declined to review the actions, orders, and rulings of a single judge sitting on a three-judge court, see *id.*, at 96, n. 14; dismissed an appeal of a temporary restraining order by a single judge of a three-judge court for want of jurisdiction, see, *e. g.*, *Hicks* v. *Pleasure House, Inc.*, 404 U. S. 1 (1971) *(per curiam)*; and stated that a court of appeals is not powerless to "give any guidance when a single judge has erroneously invaded the province of a three-judge court," *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 716 (1962) *(per curiam)*. See also *Schackman* v. *Arnebergh*, 387 U. S. 427 (1967) *(per curiam)*. In light of these cases, I think it clear that jurisdiction over a petition for mandamus in a case such as this rests in the first instance in the Court of Appeals.

Miscellaneous Orders

No. ——. DOE *v.* UNITED STATES. Motion of petitioner for leave to file petition for writ of certiorari under seal denied. Petitioner may file a redacted petition for writ of certiorari on or before June 19, 1992.

No. A–669 (91–1780). COLORADO *v.* GASKINS. Ct. App. Colo. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–1089. IN RE DISBARMENT OF WELLMAN. Disbarment entered. [For earlier order herein, see 503 U. S. 903.]

No. D–1096. IN RE DISBARMENT OF GARRICK. Disbarment entered. [For earlier order herein, see 503 U. S. 932.]

No. D–1102. IN RE DISBARMENT OF CONNER. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1107. IN RE DISBARMENT OF CHATZ. Disbarment entered. [For earlier order herein, see 503 U. S. 968.]

No. D–1129. IN RE DISBARMENT OF SMITH. It is ordered that David Paul Smith, of Englewood, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1130. IN RE DISBARMENT OF BANDY. It is ordered that James R. Bandy, of River Rouge, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $4,208.44 for the period January 1 through March 31, 1992, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 502 U. S. 1087.]

No. 91–794. HARPER ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. The order granting certiorari entered on May 18, 1992 [*ante*, p. 907], is amended to read as follows: Certiorari granted limited to Question 1 presented by the petition.

No. 91–1862. GANTT ET AL. *v.* SKELOS ET AL. Appeal from D. C. E. D. N. Y. Motion of appellants to expedite consideration of appeal denied.

No. 91–7925. YAGOW *v.* MUSICH ET AL. Sup. Ct. N. D. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 22, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 91–7926. IN RE THOMAS. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 91–1618. VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRE-

SENTATIVES, ET AL. Appeal from D. C. N. D. Ohio. Probable jurisdiction noted. Reported below: 794 F. Supp. 756 and 760.

Certiorari Denied

No. 91–383. PENNSYLVANIA DEPARTMENT OF REVENUE ET AL. *v.* BLOOMINGDALE'S BY MAIL, LTD. Sup. Ct. Pa. Certiorari denied. Reported below: 527 Pa. 347, 591 A. 2d 1047.

No. 91–664. MILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 933 F. 2d 1010.

No. 91–1284. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111 *v.* COLORADO-UTE ELECTRIC ASSN., INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 939 F. 2d 1392.

No. 91–1324. CONSOL PENNSYLVANIA COAL CO. ET AL. *v.* HUGHES ET AL.;

No. 91–1561. HUGHES ET AL. *v.* CONSOL PENNSYLVANIA COAL CO. ET AL.; and

No. 91–1681. POLLOCK ET AL. *v.* HUGHES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 945 F. 2d 594.

No. 91–1366. DARTEZ ET AL. *v.* OWENS-ILLINOIS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 1291.

No. 91–1380. DAVID *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 940 F. 2d 722.

No. 91–1441. SHWC, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF FSLIC RESOLUTION FUND AND AS RECEIVER FOR VERNON SAVINGS & LOAN ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 945 F. 2d 853.

No. 91–1452. CHICAGO TRIBUNE CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 2d 791.

No. 91–1463. SWORDS ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR NEW ORLEANS FEDERAL SAVINGS & LOAN ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–1483. IDAHO *v.* DEPARTMENT OF ENERGY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 945 F. 2d 295.

No. 91–1497. JOINER ET AL. *v.* ROBERTS ET AL.; and
No. 91–1648. ROBERTS ET AL. *v.* JOINER ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 590 So. 2d 195.

No. 91–1587. TONEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 587 So. 2d 1118.

No. 91–1604. WEIDMAN ET AL. *v.* WEIDMAN. Sup. Ct. Va. Certiorari denied.

No. 91–1608. WINSTON, A MINOR BY HIS PARENTS, WINSTON ET VIR *v.* CHILDREN AND YOUTH SERVICES OF DELAWARE COUNTY ET AL.; and
No. 91–1669. CHILDREN AND YOUTH SERVICES OF DELAWARE COUNTY ET AL. *v.* WINSTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 948 F. 2d 1380.

No. 91–1609. ANIS *v.* NEW JERSEY COMMITTEE ON ATTORNEY ADVERTISING ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 126 N. J. 448, 599 A. 2d 1265.

No. 91–1610. JENNINGS *v.* JOSHUA INDEPENDENT SCHOOL DISTRICT ET AL.; and
No. 91–1611. GLADDEN *v.* JOSHUA INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 194.

No. 91–1612. THOMAS *v.* HOFFMANN-LAROCHE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 806.

No. 91–1616. POTTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1624. KOLOKOFF ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–1625. CAIN PARTNERSHIP, LTD. *v.* PIONEER INVESTMENT SERVICES CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 445.

No. 91–1630. KING *v.* NCNB TEXAS NATIONAL BANK, SUCCESSOR IN INTEREST TO FIRST REPUBLICBANK DALLAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–1631. ST. MARY'S HOSPITAL, INC. *v.* ARKANSAS BLUE CROSS & BLUE SHIELD. C. A. 8th Cir. Certiorari denied. Reported below: 947 F. 2d 1341.

No. 91–1637. ALFRED *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 401.

No. 91–1638. EVANS *v.* CITY OF TULSA. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1258.

No. 91–1639. NELSON *v.* OFFICE OF SAM NUNN; NELSON *v.* OFFICE OF WYCHE FOWLER; and NELSON *v.* OFFICE OF RICHARD RAY. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 650.

No. 91–1643. SIMON WIESENTHAL CENTER FOR HOLOCAUST STUDIES ET AL. *v.* MCCALDEN, ADMINISTRATOR OF ESTATE OF MCCALDEN; and

No. 91–1699. MCCALDEN, ADMINISTRATOR OF ESTATE OF MCCALDEN *v.* SIMON WIESENTHAL CENTER, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 1214.

No. 91–1652. DIAZ REYES ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 744.

No. 91–1653. H. J. INC. ET AL. *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 954 F. 2d 485.

No. 91–1662. JADER FUEL CO., INC. *v.* WILLIAMS. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 2d 1388.

No. 91–1676. KNIGIN *v.* MANGANO, INDIVIDUALLY AND AS PRESIDING JUSTICE OF THE APPELLATE DIVISION OF THE STATE OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 162 App. Div. 2d 82, 560 N. Y. S. 2d 677.

No. 91–1683. POLYAK *v.* HULEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1289.

No. 91–1685. TIMMS *v.* COUGHLIN, ACTING POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 953 F. 2d 281.

No. 91–1722. BARROW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1263.

No. 91–1734. BERRIDGE ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 348.

No. 91–1764. CUDA ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 644.

No. 91–5465. PATTAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 931 F. 2d 1035.

No. 91–7274. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 2d 220.

No. 91–7316. MARTINI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1297.

No. 91–7500. MCGEARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 938.

No. 91–7530. REVELS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–7545. NAGI *v.* UNITED STATES; and
No. 91–7564. BARASH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 947 F. 2d 211.

No. 91–7546. RYAN *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 458.

No. 91–7555. KITCHENS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 823 S. W. 2d 256.

No. 91–7569. DAMRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 399.

No. 91–7593. EDGAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–7603. BENTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 1353.

No. 91–7766. HALL *v.* TURNAGE, FORMER ADMINISTRATOR OF VETERANS ADMINISTRATION. C. A. 6th Cir. Certiorari denied. Reported below: 946 F. 2d 895.

No. 91–7767. FRALEY *v.* ROBERTS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 891.

No. 91–7839. FRANCHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–7851. COFIELD *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 960 F. 2d 155.

No. 91–7886. TUCKER *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 2d 397.

No. 91–7889. GRANT *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 585 N. E. 2d 284.

No. 91–7890. KRAUL ET AL. *v.* MAINE BONDING & CASUALTY CO. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 600 A. 2d 389.

No. 91–7891. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 819 P. 2d 270.

No. 91–7893. STOIANOFF *v.* FRANCIS ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 172 App. Div. 2d 744, 570 N. Y. S. 2d 971.

No. 91–7897. MORRISON *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 946 F. 2d 1340.

No. 91–7902. THOMAS *v.* BOARD OF LAW EXAMINERS ET AL. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 91–7908. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 91–7909. KINNEY *v.* INDIANA YOUTH CENTER, BY AND THROUGH ITS DULY APPOINTED AGENTS, EMPLOYEES, AND REPRESENTATIVES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 462.

No. 91–7910. GRIFFIN *v.* WILLIAMS ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 91–7916. ROTT *v.* CONNECTICUT GENERAL LIFE INSURANCE CO. ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 478 N. W. 2d 570.

No. 91–7918. CONWAY-EL *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 91–7923. JONES *v.* INDIANAPOLIS POLICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7924. TAYLOR *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–7927. THOMAS-EL *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 91–7931. MERCIER *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–7937. MONTGOMERY *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 44.

No. 91–7939. TURNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 91–7942. GARNER *v.* ROTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 91–7949. ESPENSHADE *v.* PHILADELPHIA HIGHER EDUCATION AGENCY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 139 Pa. Commw. 666, 589 A. 2d 1194.

No. 91–7950. ANDRISANI *v.* VOGEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 358.

No. 91–7953. ROY *v.* SAN FRANCISCO POLICE DEPARTMENT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 953 F. 2d 1388.

No. 91–7954. CHASE *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 91–7957. BRIGAERTS *v.* CARDOZA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 1399.

No. 91–7969. HOFFMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 957 F. 2d 296.

No. 91–7973. FRANKLIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 118, 580 N. E. 2d 1.

No. 91–7979. CHASE *v.* BOARD OF PAROLE. Ct. App. Ore. Certiorari denied.

No. 91–8017. SINITO *v.* KINDT, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 954 F. 2d 467.

No. 91–8046. CLEMAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 91–8054. THAKKAR *v.* DEBEVOISE. C. A. 3d Cir. Certiorari denied.

No. 91–8059. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 950 F. 2d 226.

No. 91–8062. CASELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 635.

No. 91–8073. LANDT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 351.

No. 91–8085. CASTILLO-MORALES ET AL. *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 744.

No. 91–8087. WINKLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 1169.

No. 91–8088. TERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 944 F. 2d 1223.

No. 91–8093. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–8098. WYATT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 237.

No. 91–8107. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 164.

No. 91–8109. MCLEOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 48.

No. 91–8113. BISHOP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 163, 957 F. 2d 912.

No. 91–8114. TALLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 164.

No. 91–8118. HARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 91–8120. TROUT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 722.

No. 91–8122. STUTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 641.

No. 91–8125. CATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 952 F. 2d 149.

No. 91–8135. ALLISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 870.

No. 91–8148. MATHENEY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 583 N. E. 2d 1202.

No. 91–8155. PEREZ-DOMINGUEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 91–8158. ELDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 270.

No. 91–8159. FERRIOL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 90–6315. PEREZ *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SOUTER would grant the petition, vacate the judgment, and remand the case for further consideration in light of *Foucha* v. *Louisiana*, *ante*, p. 71. Reported below: 563 So. 2d 841.

No. 91–1410. WALLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Title 28 U. S. C. § 455(a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This case presents the question whether the cause of apparent partiality or bias must stem from an extrajudicial source.

I would grant the petition for writ of certiorari to resolve a recognized split among the Courts of Appeals on this issue.

Petitioner Samuel Waller and his stepfather, Gentry McKinney, were charged with 61 counts of structuring deposits to avoid currency transaction reporting requirements and one count of conspiring to commit those offenses. The District Court granted petitioner's motion to sever his trial from that of McKinney. In connection with that motion, petitioner and the Government agreed that McKinney would be tried by a jury prior to petitioner's trial. Petitioner agreed to waive his right to a jury trial and to have a bench trial using the relevant evidence from McKinney's trial, as supplemented by any evidence adduced relative to petitioner's role in the offense.

The same judge presided at both trials. McKinney was convicted on all counts in September 1989 and sentenced in December 1989. As part of the sentencing record, the judge reviewed a Federal Bureau of Investigation (FBI) memorandum appended to McKinney's presentence report. This memo alleged that McKinney and petitioner had been involved in drug trafficking and disclosed the full scope of criminal activity in which the Government suspected petitioner and McKinney were involved. Petitioner was later convicted after his bench trial in April 1990. Prior to his sentencing in January 1991, petitioner received a copy of his presentence report, which also had the FBI memorandum attached. Petitioner discovered that the District Court used the memo in McKinney's sentence and, consequently, that the judge had read all of its prejudicial allegations about petitioner prior to the time he presided at the bench trial.

Petitioner moved for a new trial, alleging that the judge should have disqualified himself, pursuant to 28 U. S. C. § 455(a), because of the appearance of bias and partiality created by prior receipt of the FBI memorandum and failure to disclose its existence prior to bench trial. The District Court denied the motion because the prejudicial information about petitioner was not received from an extrajudicial source, *i. e.*, one independent of the prosecution of petitioner and McKinney. The judge acknowledged that the appearance of bias existed, but stated further that he did not believe he was in fact biased, that he either rejected or failed to recall specific allegations from the memo during trial, and that he ignored any inadmissible evidence in adjudicating petitioner's guilt.

Relying on *United States* v. *Monaco*, 852 F. 2d 1143, 1147 (CA9 1988), cert. denied, 488 U. S. 1040 (1989), and *United States* v. *Winston*, 613 F. 2d 221, 223 (CA9 1980), the Ninth Circuit affirmed in an unpublished opinion, holding that "[i]nformation obtained by a judge through judicial duties in relation to one co-defendant . . . cannot serve to disqualify that judge from the subsequent trial of another codefendant." App. to Pet. for Cert. A–4. The appellate court supported its conclusion by noting that the judge read the memo more than five months prior to petitioner's bench trial and had forgotten the significance and the specific allegations of the memo; that a judge is presumed to ignore inadmissible evidence in deciding a case; and that petitioner agreed the judge could consider evidence from McKinney's trial and was aware the judge would have access to all information from those proceedings. "Given these facts," the Ninth Circuit concluded, "we see no reasonable grounds for questioning [the trial judge's] impartiality because of bias or prejudice." *Id.*, at A–6.

The Ninth Circuit explicitly rejected the First Circuit's contrary approach in *United States* v. *Chantal*, 902 F. 2d 1018 (1990), where the First Circuit emphasized that it "has repeatedly subscribed to what all commentators characterize as the correct view that . . . the source of the asserted bias/prejudice in a § 455(a) claim can originate explicitly in judicial proceedings," *id.*, at 1022. See *Panzardi-Alvarez* v. *United States*, 879 F. 2d 975, 983–984 (CA1 1989); *United States* v. *Kelley*, 712 F. 2d 884, 889–890 (CA1 1983); *United States* v. *Cepeda Penes*, 577 F. 2d 754, 758 (CA1 1978); *United States* v. *Cowden*, 545 F. 2d 257, 265 (CA1 1976), cert. denied, 430 U. S. 909 (1977). The First Circuit has concluded that the language of § 455(a) is "automatic, mandatory and self-executing"; that "[i]t did away with the 'duty to sit' doctrine"; and that "[i]t attacks the appearance of bias, not just bias in fact." *Chantal*, *supra*, at 1023. That the First Circuit would consider appearances of judicial bias and prejudice originating in judicial proceedings conflicts not only with the Ninth Circuit, but also with the Fourth, Fifth, Sixth, and Eleventh Circuits. See *United States* v. *Mitchell*, 886 F. 2d 667, 671 (CA4 1989); *United States* v. *Merkt*, 794 F. 2d 950, 960 (CA5 1986), cert. denied, 480 U. S. 946 (1987); *United States* v. *Sammons*, 918 F. 2d 592, 599 (CA6 1990); *McWhorter* v. *Birmingham*, 906 F. 2d 674, 678 (CA11 1990).

Here, the trial judge stated: "'I do believe that the appearance of the question exists, and I think it is aggravated here by the fact I allowed a waiver of the jury.'" Reply to Brief in Opposition 6

(quoting Transcript of Motions Hearings). The District Court, in line with its precedent in the Ninth Circuit and other Circuits, pretermitted any such consideration upon the conclusion that only extrajudicial sources can lead to reasonable questions about the judge's impartiality, a rule that the First Circuit rejects.

The statute itself gives no indication regarding the correct resolution of this recurring question. Because the Courts of Appeals have settled into differing interpretations of this statutory recusal provision, I would grant certiorari to resolve the conflict.

No. 91–1447. BINGHAM *v.* INLAND DIVISION OF GENERAL MOTORS. C. A. 6th Cir. Certiorari denied. JUSTICE BLACKMUN would grant the petition, vacate the judgment, and remand the case for further consideration in light of the 1991 Amendments to Federal Rule of Civil Procedure 15(c). Reported below: 947 F. 2d 944.

No. 91–1515. CAMPBELL ET AL. *v.* BRUMMETT. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1178.

JUSTICE WHITE, dissenting.

The Court once again declines to grant certiorari in a case in which the petitioners raise a subject of clear disagreement among the Courts of Appeals. Once again, I dissent. The questions presented concern whether Rev. Stat. § 1979, 42 U. S. C. § 1983, provides a cause of action for malicious prosecution and, if so, when the cause of action accrues.

Respondent was prosecuted for failing to repay a loan to petitioner First State Bank of Cleburne, Texas. The loan, for more than $30,000, had been collateralized by the equipment and inventory of his stereo business. Respondent, who said that he sold the inventory in the normal course of business, was indicted under a provision of the Texas Penal Code that makes it a felony to "remove" from the State collateral securing a debt. Tex. Penal Code Ann. § 32.33 (1983). After three years of court appearances, the charge was dismissed for insufficient evidence.

Respondent sued the prosecuting attorneys, the county, the bank, and certain bank employees, alleging that they conspired to prosecute him maliciously in violation of state law and § 1983. The District Court dismissed the action as to the county and the prosecuting attorneys on immunity grounds and entered summary judgment as to the remaining defendants on the ground that respondent's claims were time barred.

The Court of Appeals reversed in relevant part.* Although it noted that there has been considerable confusion in the Courts of Appeals concerning the availability and contours of a § 1983 malicious prosecution claim, see *Brummett* v. *Camble[sic]*, 946 F. 2d 1178, 1180, n. 2 (CA5 1991) (collecting cases), the court observed that recent Fifth Circuit cases "have assumed that malicious prosecution violates § 1983." *Ibid.* The court then held that respondent's claim was not time barred because a cause of action for malicious prosecution under § 1983 does not accrue until the underlying prosecution has terminated in favor of the criminal defendant. *Id.*, at 1184.

The Third, Sixth, and Tenth Circuits follow the rule that the Fifth Circuit applied here. See *Robinson* v. *Maruffi*, 895 F. 2d 649, 654 (CA10 1990); *Rose* v. *Bartle*, 871 F. 2d 331, 349 (CA3 1989); *McCune* v. *Grand Rapids*, 842 F. 2d 903, 907 (CA6 1988). However, the First Circuit has held that a malicious prosecution claim accrues at the time of arrest and not when the allegedly abusive proceeding comes to a conclusion, which may be years later. *Walden, III, Inc.* v. *Rhode Island*, 576 F. 2d 945, 947, n. 5 (1978). The Ninth Circuit's treatment of the question has been inconsistent. Compare *Cline* v. *Brusett*, 661 F. 2d 108, 111 (1981) (following majority rule), with *Gowin* v. *Altmiller*, 663 F. 2d 820, 822 (1981) (following minority rule).

Clearly, this is an area of law that requires our attention. Therefore, I would grant certiorari to determine if a cause of action for malicious prosecution is available under § 1983 and, if it is, when the cause of action accrues.

No. 91-1550. MCCLEARY *v.* NAVARRO ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 331.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

Respondents filed this lawsuit after police, who were attempting to execute a search warrant, began kicking at their door at 11 o'clock one night. The police were looking for a suspected

*The Fifth Circuit agreed with the District Court that the prosecutors were immune, but vacated the judgment as to the county to allow "for further consideration in light of later events in the trial court." *Brummett* v. *Camble[sic]*, 946 F. 2d 1178, 1183 (1991). The county is not a party to this petition.

cocaine dealer, but they got the wrong house. The question presented is whether petitioner, the officer who drafted the search warrant affidavit describing the house to be searched, is entitled to qualified immunity. Because the Court of Appeals applied the wrong legal standard in answering that question, I would reverse the judgment and remand the case for further consideration.

Petitioner, a detective, received a tip from a confidential informant that one Andres Villa had drugs in his home, one of several small houses on an access road to a plant. The first building was set back from the road, along a separate driveway. The informant did not count this structure when he told petitioner that Villa lived in the second house on the right. Consequently, the warrant that petitioner obtained directed officers to go to the second house on the right. The officers executing the warrant counted differently, so they ended up at the wrong house.

Respondents sued petitioner and others not party to this petition under Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging a violation of their Fourth Amendment rights. The District Court denied petitioner's motion for summary judgment on grounds of qualified immunity. The Court of Appeals affirmed, holding "that the question in this case is whether a police officer in [petitioner's] position would reasonably have described the location with sufficient particularity to direct those executing the warrant to the *correct* house on the right" and "that it is for the jury to decide whether [petitioner] acted reasonably . . . ." *Navarro* v. *Barthel*, 952 F. 2d 331, 333 (CA9 1991) *(per curiam)*.

The decision of the Court of Appeals was entered just a few days after our judgment in *Hunter* v. *Bryant*, 502 U. S. 224, 227 (1991), in which we explained that the appropriate inquiry was whether a reasonable officer *could* have thought that he had acted in accordance with the Constitution, and not whether an officer *would* have acted otherwise (the standard applied by the Ninth Circuit in *Hunter* and the present case). This distinction provides "ample room for mistaken judgments," because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 343, 341 (1986), quoted in *Hunter*, *supra*, at 229.

In *Hunter* we also reiterated the principle that questions of immunity ordinarily should be decided by the court, not by the jury, 502 U. S., at 228, because "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability," *Mitchell* v.

Forsyth, 472 U. S. 511, 526 (1985). See *Hunter*, *supra*, at 227 (collecting cases).

Because the Court of Appeals did not have the benefit of our decision in *Hunter* when it was deciding this case, I would summarily reverse the judgment and remand the case so the Ninth Circuit may reexamine its decision in light of the correct legal standards.

No. 91–1667. CENTRA ET AL. *v.* MCDONALD ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 946 F. 2d 1059.

Rehearing Denied

No. 91–7247. WILLIAMSON *v.* OKLAHOMA, 503 U. S. 973;
No. 91–7648. ANDERSON *v.* UNITED STATES, 503 U. S. 995; and
No. 91–7655. LLOYD *v.* UNITED STATES, 503 U. S. 996. Petitions for rehearing denied.

JUNE 3, 1992

Miscellaneous Order

No. A–913 (91–8475). GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

JUNE 8, 1992

Certiorari Granted—Vacated and Remanded

No. 91–734. NORTHWEST AIRLINES, INC. *v.* WEST. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Morales* v. *Trans World Airlines, Inc.*, *ante*, p. 374. Reported below: 923 F. 2d 657.

No. 91–6762. CORLEY *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for fur-

ther consideration in light of *Williams* v. *United States*, 503 U. S. 193 (1992). Reported below: 943 F. 2d 1313.

Miscellaneous Orders

No. A–747 (91–1863). KLAGISS *v.* INDIANA. Ct. App. Ind. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1097. IN RE DISBARMENT OF FRIEDMAN. Disbarment entered. [For earlier order herein, see 503 U. S. 932.]

No. D–1098. IN RE DISBARMENT OF KENNEY. Disbarment entered. [For earlier order herein, see 503 U. S. 932.]

No. D–1099. IN RE DISBARMENT OF HART. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1101. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1106. IN RE DISBARMENT OF HOROWITZ. Howard Horowitz, of Coral Gables, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 6, 1992 [503 U. S. 968], is hereby discharged.

No. D–1108. IN RE DISBARMENT OF ROSCH. Disbarment entered. [For earlier order herein, see 503 U. S. 968.]

No. D–1131. IN RE DISBARMENT OF BRITTON. It is ordered that James R. Britton, of Bismarck, N. D., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1132. IN RE DISBARMENT OF KAISER. It is ordered that Marvin L. Kaiser, of Williston, N. D., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1133. IN RE DISBARMENT OF SNYDER. It is ordered that Vincent Thomas Snyder, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue,

returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1134. IN RE DISBARMENT OF KIMURA. It is ordered that Robert Yutaka Kimura, of Honolulu, Haw., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1135. IN RE DISBARMENT OF PIKEN. It is ordered that Arthur J. Piken, of Kew Gardens, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1136. IN RE DISBARMENT OF PARKER. It is ordered that Valentine Fraser Parker, of Huntington, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1137. IN RE DISBARMENT OF CAHN. It is ordered that William Cahn, of Tido Beach, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90–985. BRAY ET AL. *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL. C. A. 4th Cir. [Certiorari granted, 498 U. S. 1119.] Case restored to calendar for reargument.

No. 91–453. LUCAS *v.* SOUTH CAROLINA COASTAL COUNCIL. Sup. Ct. S. C. [Certiorari granted, 502 U. S. 966.] Motion of National Growth Management Leadership Project et al. to withdraw Chesapeake Bay Foundation from the list of members joining its *amicus curiae* brief granted.

No. 91–871. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 1st Cir. [Certiorari granted, 503 U. S. 935.] Motion of the Solicitor General for divided argument granted.

No. 91–1075. BAILES *v.* UNITED STATES, 503 U. S. 1001. Motion of petitioner for costs and fees denied.

No. 91–1521. UNITED STATES *v.* GREEN. Ct. App. D. C. [Certiorari granted, *ante*, p. 908.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 91–1671. MERTENS ET AL. *v.* HEWITT ASSOCIATES. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 91–7328. HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. [Certiorari granted, 502 U. S. 1085.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–7758. IN RE LANDES. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 29, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 91–7938. IN RE VISSER. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 29, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition for writ of mandamus.

No. 91–8013. CLAMPITT *v.* INTERINSURANCE EXCHANGE ET AL. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 29, 1992, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 91–1709. IN RE MILLS. Ct. App. N. Y. Petition for writ of common-law certiorari and/or mandamus denied. Reported below: 78 N. Y. 2d 1121, 586 N. E. 2d 57.

No. 91–8281. IN RE KWOH CHENG SUN. Petition for writ of habeas corpus denied.

No. 91–7876. IN RE KALTENBACH;
No. 91–7943. IN RE CRENSHAW; and

No. 91–8067. IN RE BACHYNSKY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 91–522. SAUDI ARABIA ET AL. *v.* NELSON ET UX. C. A. 11th Cir. Certiorari granted. Reported below: 923 F. 2d 1528.

No. 91–1645. WOOD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari granted. Reported below: 955 F. 2d 908.

No. 91–7580. GRAHAM *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 950 F. 2d 1009.

No. 91–7358. BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question I presented by the petition. Reported below: 944 F. 2d 1363.

Certiorari Denied. (See also No. 91–1709, *supra.*)

No. 91–505. WEST *v.* NORTHWEST AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 657.

No. 91–1396. MARSHALL ET AL. *v.* SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 91–1398. WALDMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 941 F. 2d 1544.

No. 91–1443. MACKIE, DBA WARWICK *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF FSLIC RESOLUTION FUND. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 1285.

No. 91–1489. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 942 F. 2d 792.

No. 91–1504. DEGEROLAMO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 79.

No. 91–1517. BREGNARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 951 F. 2d 457.

No. 91–1581. UNIVERSAL UNDERWRITERS INSURANCE CO. *v.* GERRISH CORP., DBA GERRISH MOTORS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 947 F. 2d 1023.

No. 91–1628. ROSENGARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 949 F. 2d 905.

No. 91–1647. SEPE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 592 So. 2d 250.

No. 91–1650. LEE *v.* BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 948 F. 2d 1162.

No. 91–1654. STARKEY LABORATORIES, INC. *v.* GN DANAVOX, INC. Ct. App. Minn. Certiorari denied. Reported below: 476 N. W. 2d 172.

No. 91–1655. GARDNER ET AL. *v.* RYAN, SECRETARY OF STATE OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 147 Ill. 2d 270, 588 N. E. 2d 1033.

No. 91–1656. OKLAHOMA *v.* BURKE. Ct. Crim. App. Okla. Certiorari denied. Reported below: 820 P. 2d 1344.

No. 91–1659. BYRD ET AL. *v.* BUHAROV ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–1661. FERRIS *v.* BOARD OF COUNTY COMMISSIONERS OF MESA COUNTY, COLORADO, ET AL. Ct. App. Colo. Certiorari denied.

No. 91–1666. INTERNATIONAL RESOURCES, INC., ET AL. *v.* NEW YORK LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 950 F. 2d 294.

No. 91–1675. ZARDA ET AL. *v.* KANSAS ET AL.; and DEAN ET AL. *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 250 Kan. 364, 826 P. 2d 1365 (first case); 250 Kan. 417, 826 P. 2d 1372 (second case).

No. 91–1678. MERCADO LATINO, INC. *v.* SOLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 361.

No. 91–1687. BLANKINSHIP ET AL. *v.* CINCO ENTERPRISES, INC. Ct. App. Okla. Certiorari denied.

No. 91–1689. PATTERSON *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 91–1705. MALTA ET AL. *v.* SCHULMERICH CARILLONS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 952 F. 2d 1320.

No. 91–1714. PRICE *v.* CARPENTER, SHERIFF OF TARRANT COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 346.

No. 91–1726. PHANTOM TOURING CO. *v.* AFFILIATED PUBLICATIONS, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 953 F. 2d 724.

No. 91–1731. STRANCZEK, MAYOR OF THE VILLAGE OF CRESTWOOD, ET AL. *v.* SCHULTZ ET AL. C. A. 7th Cir. Certiorari denied.

No. 91–1761. PRAVDA *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 1.

No. 91–1768. MCCARTY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 91–1776. ERWIN ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 951 F. 2d 352.

No. 91–1795. DANIELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–1801. GILBERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1290.

No. 91–1810. TOLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 364.

No. 91–1828. COPLIN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 952 F. 2d 403.

No. 91–6757. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 819 S. W. 2d 806.

No. 91–7377. MOOYMAN *v.* WORKMEN'S COMPENSATION APPEAL BOARD ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 528 Pa. 646, 600 A. 2d 197.

No. 91–7494. RUCKINGER *v.* FULCOMER, DEPUTY COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 947 F. 2d 936.

No. 91–7574. MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 951 F. 2d 345.

No. 91–7583. WAKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 1422.

No. 91–7589. DEBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 949 F. 2d 199.

No. 91–7597. GUNTER *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 91–7598. HILL, AKA ROBINSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 951 F. 2d 867.

No. 91–7610. MEDRANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 951 F. 2d 1264.

No. 91–7629. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 949 F. 2d 737.

No. 91–7666. SCHANDL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 462.

No. 91–7759. SINDRAM *v.* NELSON ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 163, 957 F. 2d 912.

No. 91–7866. MCCONNELL *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–7894. STOIANOFF *v.* WACHTLER. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1160.

No. 91–7956. ANDERSSON ET AL. *v.* FIBER COMPOSITES, INC. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 592 So. 2d 1093.

No. 91–7962. BOLINDER *v.* GALLARDO. Ct. App. Utah. Certiorari denied.

No. 91–7964. SHAW *v.* SENKOWSKI, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–7968. DELLAERO *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 91–7976. SHUMATE *v.* NCNB NATIONAL BANK OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 639.

No. 91–7978. ALKATABI ET AL. *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 91–7981. DAVIS *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 91–7982. HOWELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–7983. EAST *v.* WEST ONE BANK, N. A., PERSONAL REPRESENTATIVE OF THE ESTATE OF LOGAN. Ct. App. Idaho. Certiorari denied. Reported below: 120 Idaho 226, 815 P. 2d 35.

No. 91–7985. DAVASHER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 308 Ark. 154, 823 S. W. 2d 863.

No. 91–7988. ZICHKO *v.* NAVARRO. Sup. Ct. Idaho. Certiorari denied.

No. 91–7990. WHIGHAM *v.* NEW YORK TELEPHONE. C. A. 2d Cir. Certiorari denied.

No. 91–7992. WOHLFORD ET UX. *v.* MAYS ET AL. Cir. Ct. Wythe County, Va. Certiorari denied.

No. 91–7998. CRUSE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 588 So. 2d 983.

No. 91–8006. MASTERSON *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 91–8008. BROOKS *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 952 F. 2d 409.

No. 91–8011. AZIZ *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 953 F. 2d 649.

No. 91–8014. CASSIDY *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 91–8016. BURNETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 292, 953 F. 2d 688.

No. 91–8027. COMBS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 278, 581 N. E. 2d 1071.

No. 91–8032. MIDGYETTE *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8034. FUENTES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 954 F. 2d 151.

No. 91–8038. CHATMAN, AKA PALTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 569.

No. 91–8041. WHALEY *v.* MAASS. Ct. App. Ore. Certiorari denied. Reported below: 108 Ore. App. 365, 815 P. 2d 722.

No. 91–8048. PASCUAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–8072. MILLER, AKA WOODS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 944 F. 2d 396.

No. 91–8077. FIELDS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 91–8090. ZOLICOFFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 724.

No. 91–8101. AULTMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 529 Pa. 268, 602 A. 2d 1290.

No. 91–8112. ADAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 91–8133. GUZMAN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 166 Wis. 2d 577, 480 N. W. 2d 446.

No. 91–8134. FRAZIER *v.* CUSTODIAN OF THE KENTUCKY STATE REFORMATORY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 956 F. 2d 1164.

No. 91–8138. PRUNEDA-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 190.

No. 91–8145. COUSINO *v.* ACTION MAILERS ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8149. PATRONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 948 F. 2d 813.

No. 91–8151. PETTAWAY ET AL. *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 209.

No. 91–8156. BANKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 953 F. 2d 1384.

No. 91–8157. KRAUSE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 265.

No. 91–8163. TIMBERS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 292, 953 F. 2d 688.

No. 91–8170. ZSIDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 948 F. 2d 1291.

No. 91–8176. BLAIZE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 850.

No. 91–8178. MCNEIL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–8194. DIGGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 299, 958 F. 2d 1157.

No. 91–8197. LARIOS CORTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 363.

No. 91–8205. McCOY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 944 F. 2d 903.

No. 91–8208. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 955 F. 2d 42.

No. 91–8210. PORTWOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 568.

No. 91–8213. McCALL *v.* HESSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8215. METZGER *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS. C. A. 3d Cir. Certiorari denied.

No. 91–8252. ROBINSON *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 90–1606. ATTORNEY GENERAL OF CALIFORNIA ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 949 F. 2d 141.

No. 91–142. TIDEWATER MARINE SERVICE, INC., ET AL. *v.* AUBRY ET AL. C. A. 9th Cir. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 918 F. 2d 1409.

No. 91–349. PACIFIC MERCHANT SHIPPING ASSN. ET AL. *v.* AUBRY, LABOR COMMISSIONER, DIVISION OF LABOR STANDARDS ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA. C. A. 9th Cir. Motion of American Waterways Operators, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 918 F. 2d 1409.

No. 91–502. PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. *v.* FEDERAL EXPRESS CORP. C. A. 9th Cir. Motions of California Trucking Association, International Brotherhood of Teamsters, and National Association of Regulatory Utility Commissioners for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 936 F. 2d 1075.

No. 91–1426. CALIFORNIA *v.* HARDEN. Ct. App. Cal., 6th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 91–1519. COSTELLO *v.* MCENERY ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 948 F. 2d 1278.

No. 91–1672. BIODEX CORP. *v.* LOREDAN BIOMEDICAL, INC., ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 946 F. 2d 850.

No. 91–7972. JONES *v.* AT&T TECHNOLOGIES, INC. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 943 F. 2d 49.

Rehearing Denied

No. 91–1405. OPTIMAL DATA CORP. *v.* UNITED STATES, 503 U. S. 986;

No. 91–1457. PIOTROWSKI ET AL. *v.* CITY OF CHICAGO, 503 U. S. 986;

No. 91–7026. COVILLION *v.* AETNA LIFE & CASUALTY ET AL., 503 U. S. 922;

No. 91–7264. IN RE JARVI, 503 U. S. 982;

No. 91–7298. WICKLIFFE *v.* AIKEN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, ET AL., 503 U. S. 974;

No. 91–7520. FITE *v.* CANTRELL ET AL., 503 U. S. 1007; and

No. 91–7532. MEYER *v.* MEYER (two cases), 503 U. S. 993. Petitions for rehearing denied.

JUNE 11, 1992

Dismissal Under Rule 46

No. 91–7864. LOPEZ-GIL *v.* UNITED STATES. C. A. 1st Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 965 F. 2d 1124.

JUNE 15, 1992

Certiorari Granted—Vacated and Remanded

No. 91–7295. KYLE *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Shano*, 955 F. 2d 291 (CA5 1992) (withdrawing *United States* v. *Shano*, 947 F. 2d

1263 (1991)), and United States Sentencing Commission, Guidelines Manual §4B1.2, comment., n. 2 (Nov. 1991). THE CHIEF JUSTICE, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE THOMAS dissent. Reported below: 946 F. 2d 891.

Miscellaneous Orders

No. A–894. INTERCONTINENTAL LIFE INSURANCE CO. *v.* LINDBLOM. Sup. Ct. Ala. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE O'CONNOR would grant the application.

No. D–1103. IN RE DISBARMENT OF WINN. Disbarment entered. [For earlier order herein, see 503 U. S. 956.]

No. D–1109. IN RE DISBARMENT OF PRESNICK. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1111. IN RE DISBARMENT OF TESSLER. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1114. IN RE DISBARMENT OF HARRISON. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1115. IN RE DISBARMENT OF D'ALBORA. Disbarment entered. [For earlier order herein, see 503 U. S. 980.]

No. D–1138. IN RE DISBARMENT OF JACOBO. It is ordered that Winston W. Jacobo, of St. Augustine, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1139. IN RE DISBARMENT OF FINE. It is ordered that David M. Fine, of Richmond, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1140. IN RE DISBARMENT OF FITZPATRICK. It is ordered that James Joseph Fitzpatrick, of Portsmouth, N. H., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. JUSTICE SOUTER took no part in the consideration or decision of this order.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. The Court by order dated April 20, 1992 [503 U. S. 981], awarded the Special Master interim compensation and reimbursement of expenses. The Court also allowed the parties and the proposed intervenors/*amici* to comment further on the Special Master's suggestion of a one-time special assessment of costs to the intervenors/*amici*.

Although different arguments have been advanced as to the appropriate amounts to be assessed, no party or proposed intervenor/*amicus* has objected to the propriety of including nonobjecting *amici* in the assessment. We therefore do not reach the issue, deeming the parties to have agreed with the procedure. The Special Master found that the proceedings were expanded and made more costly by reason of *amici* participation, and the *amici* presumably acknowledge this to be the case. In light of these considerations, the interim award to the Special Master shall be paid as follows:

(1) the State of Colorado, a party to this original action, is assessed the amount of $25,000, the amount recommended by the Special Master;

(2) the four proposed intervenors/*amici*, Basin Electric Power Cooperative, Central Nebraska Public Power and Irrigation District, the National Audubon Society, and the Platte River Whooping Crane Critical Habitat Maintenance Trust, are each assessed $5,000, an amount to which none have objected; and

(3) the remaining award is to be paid 40% by Nebraska, 40% by Wyoming, and 20% by the United States.

JUSTICE WHITE would adopt the recommendation of the Special Master respecting the allocation of his fees and expenses among the parties and the *amici*. [For earlier order herein, see, *e. g.*, *ante*, p. 905.]

JUSTICE STEVENS, dissenting.

Because I do not believe that the Court has authority to assess costs against nonparties, I respectfully dissent from the order to the extent it provides for an assessment against *amici curiae*.[1]

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[1] Cf. Comment, Protecting Defendant-Intervenors from Attorneys' Fee Liability in Civil Rights Cases, 23 Harv. J. Legis. 579, 588 (1986) ("Courts have consistently assumed that an amicus curiae is exempt from attorneys' fee liability"); *Chance* v. *Board of Examiners*, 70 F. R. D. 334, 340 (SDNY 1976).

I do not think that it is proper for the Court to justify its exercise of this authority on the basis of the *amici's* failure to object, especially when the assessment is for an interim payment to the Special Master in the course of an ongoing proceeding.[2]

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. First Interim Report of the Special Master is received and ordered filed. Recommendations of the Special Master are adopted. It is ordered that the motion of Connecticut Office of Consumer Counsel for leave to intervene is denied. It is further ordered that the motion of United Illuminating Co., New England Power Co., Connecticut Light & Power Co., Canal Electric Co., Montaup Electric Co., and Taunton Municipal Lighting Plant for leave to intervene is granted. Defendant is allowed 20 days within which to file and serve its answer to the complaint of the intervening plaintiffs. JUSTICE SOUTER took no part in the consideration or decision of these orders. [For earlier order herein, see, *e. g.*, *ante*, p. 905.]

No. 91–10. SPECTRUM SPORTS, INC., ET AL. *v.* MCQUILLAN ET VIR, DBA SORBOTURF ENTERPRISES. C. A. 9th Cir. [Certiorari granted, 503 U. S. 958.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 91–882. LEWY ET AL. *v.* VIRGINIA DEPARTMENT OF TAXATION. Sup. Ct. Va. Motion of petitioners to grant petition for writ of certiorari denied.

No. 91–1030. WITHROW *v.* WILLIAMS. C. A. 6th Cir. [Certiorari granted, 503 U. S. 983.] Motion for appointment of counsel granted, and it is ordered that Seth P. Waxman, Esq., of Washington, D. C., be appointed to serve as counsel for respondent in this case.

No. 91–1210. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL., 503 U. S. 930. Motion of appellees to retax costs granted.

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[2] Cf. 2 Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, Judicial Code of Conduct, Canons 3(C)(1)(a)–(e) and 3(D), pp. I–7, I–9 (1990) (limiting circumstances in which parties may waive judicial disqualification).

No. 91–1393. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* FRETWELL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 908.] Motion for appointment of counsel granted, and it is ordered that Ricky B. Medlock, Esq., of Little Rock, Ark., be appointed to serve as counsel for respondent in this case.

No. 91–1420. GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* EMISON ET AL. D. C. Minn. [Probable jurisdiction noted, 503 U. S. 958.] Motion of Martin Frost et al. for leave to file a brief as *amici curiae* granted.

No. 91–8385. IN RE PORZIO. Petition for writ of habeas corpus denied.

No. 91–1811. IN RE POLYAK; and

No. 91–8219. IN RE DALL. Petitions for writs of mandamus denied.

No. 91–1707. IN RE UNITED SERVICES AUTOMOBILE ASSN. Petition for writ of mandamus denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Certiorari Granted

No. 91–1538. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 953 F. 2d 1116.

No. 91–1695. PIONEER INVESTMENT SERVICES CO. *v.* BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 943 F. 2d 673.

No. 91–1160. ARAVE, WARDEN *v.* CREECH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 947 F. 2d 873.

No. 91–7749. ORTEGA-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 91-1363. JOHNSON, STATE'S ATTORNEY OF KANE COUNTY, ET AL. *v.* CHI FENG SU. C. A. 7th Cir. Certiorari denied. Reported below: 944 F. 2d 907.

No. 91-1367. STURMAN *v.* UNITED STATES;
No. 91-1533. LEVINE ET AL. *v.* UNITED STATES; and
No. 91-1596. STURMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 1466.

No. 91-1374. QUATTROCCHI ET AL. *v.* COCHRANE. C. A. 1st Cir. Certiorari denied. Reported below: 949 F. 2d 11.

No. 91-1388. HANNA BOYS CENTER *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 1295.

No. 91-1464. PALMER *v.* LEVY. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 196.

No. 91-1525. NEW MEDICO NEUROLOGIC CENTER OF MICHIGAN, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 951 F. 2d 350.

No. 91-1528. MESNICK *v.* GENERAL ELECTRIC CO. C. A. 1st Cir. Certiorari denied. Reported below: 950 F. 2d 816.

No. 91-1534. TOTAL CARE, INC. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397.

No. 91-1535. BASH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 91-1537. GARZA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 942 F. 2d 903.

No. 91-1559. AVERY ET UX. *v.* TURNER, TRUSTEE; and
No. 91-1725. TURNER, TRUSTEE *v.* AVERY ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 947 F. 2d 772.

No. 91-1560. HOCHSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 393.

No. 91–1563. AIU INSURANCE CO. ET AL. *v.* SUPERINTENDENT, MAINE BUREAU OF INSURANCE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 600 A. 2d 1115.

No. 91–1629. FEITT *v.* OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF TREASURY. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 721.

No. 91–1691. MOORE *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 91–1694. LATIAN, INC., ET AL. *v.* BANCO DO BRASIL, S. A., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 234 Cal. App. 3d 973, 285 Cal. Rptr. 870.

No. 91–1696. BOWMAN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 573 N. E. 2d 910.

No. 91–1698. OLSON *v.* GENERAL DYNAMICS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 1418.

No. 91–1701. COSTELLO ET AL. *v.* JANSON, ADMINISTRATRIX OF THE ESTATE OF MONTOUR, ET AL. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1101, 585 N. E. 2d 353.

No. 91–1708. LESLIE *v.* MALVEAUX ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–1711. GORDON *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 821 S. W. 2d 132.

No. 91–1712. CONSTRUCTIVIST FOUNDATION, FKA LEE FOUNDATION, INC. *v.* DEKALB COUNTY BOARD OF TAX ASSESSORS. Sup. Ct. Ga. Certiorari denied. Reported below: 261 Ga. XXIX, 411 S. E. 2d 42.

No. 91–1724. CEMCO, INC., ET AL. *v.* NEWMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 950 F. 2d 1364.

No. 91–1783. SCHMIDT *v.* SCHMIDT. Sup. Ct. Va. Certiorari denied.

No. 91–1807. WEBBER ET AL. *v.* GULF OIL CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 91–1830. UPCHURCH ET AL. *v.* CLARK. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 44.

No. 91–5550. FAIN *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 119 Idaho 670, 809 P. 2d 1149.

No. 91–6732. RHOADES *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 120 Idaho 795, 820 P. 2d 665.

No. 91–7376. MCDONALD *v.* YELLOW CAB METRO, INC., ET AL. Sup. Ct. Tenn. Certiorari denied.

No. 91–7449. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 914.

No. 91–7484. GOSIER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 145 Ill. 2d 127, 582 N. E. 2d 89.

No. 91–7702. BENNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 943 F. 2d 738.

No. 91–7737. GILSENAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 949 F. 2d 90.

No. 91–7779. HALLMAN *v.* UNITED STATES; and
No. 91–8082. GAUNT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 293 U. S. App. D. C. 356, 954 F. 2d 787.

No. 91–7920. VITRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1159.

No. 91–7997. BENEFIEL *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 578 N. E. 2d 338.

No. 91–8018. KELLY *v.* FIVE UNIDENTIFIED BOOKING OFFICERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 396.

No. 91–8020. JOHNSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 866.

No. 91–8024. URDENIS *v.* THERMAL INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 952 F. 2d 1394.

No. 91–8025. CASSELL *v.* LANDISVILLE DISTRICT OF THE LANCASTER MENNONITE CONFERENCE. Super. Ct. Pa. Certiorari denied. Reported below: 410 Pa. Super. 648, 590 A. 2d 370.

No. 91–8029. LYLE ET VIR *v.* DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Sup. Ct. Fla. Certiorari denied. Reported below: 593 So. 2d 1052.

No. 91–8040. BENTLEY *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 177 App. Div. 2d 732, 576 N. Y. S. 2d 1021.

No. 91–8042. WELDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 394.

No. 91–8045. CORLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 91–8051. FRASER *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 953 F. 2d 1379.

No. 91–8056. LEDLOW *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 730.

No. 91–8058. CLEMENS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1231, 872 P. 2d 813.

No. 91–8070. SCOTT *v.* DIME SAVINGS BANK OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 956 F. 2d 1161.

No. 91–8071. AGUALO *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 948 F. 2d 1116.

No. 91–8074. PARKUS *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 91–8078. GAMBLE *v.* ASHCROFT, GOVERNOR OF MISSOURI, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 91–8079. HENTHORN *v.* SWINSON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 955 F. 2d 351.

No. 91–8081. HARDIN *v.* ELKINS ET AL. C. A. 6th Cir. Certiorari denied.

No. 91–8139. MCKNIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 898.

No. 91–8165. TOSTE *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1172.

No. 91–8177. BOSCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 951 F. 2d 1546.

No. 91–8181. MOORE *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 951 F. 2d 1200.

No. 91–8188. FULFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 91–8195. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 954 F. 2d 722.

No. 91–8196. VARGAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 597.

No. 91–8201. FARKAS ET AL. *v.* ELLIS. C. A. 2d Cir. Certiorari denied. Reported below: 953 F. 2d 636.

No. 91–8202. KINNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 863.

No. 91–8204. MULLINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 954 F. 2d 725.

No. 91–8206. MOUSSA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 961 F. 2d 1569.

No. 91–8207. PHELPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 1258.

No. 91–8209. MAYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 957 F. 2d 858.

No. 91–8214. MCKINNEY *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 91–8224. BLANTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 49.

No. 91–8226. JENKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 730.

No. 91–8229. GRADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 956 F. 2d 279.

No. 91–8242. CAPPS, AKA JONESON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 952 F. 2d 1026.

No. 91–8243. CHAPPELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 956 F. 2d 272.

No. 91–8244. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 953 F. 2d 651.

No. 91–8246. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 1079.

No. 91–8248. KIRSCH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 166 Wis. 2d 4, 480 N. W. 2d 569.

No. 91–8250. MORGAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 958 F. 2d 847.

No. 91–8256. CESPEDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 394.

No. 91–8263. NEALY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 264.

No. 91–8264. MORTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 961 F. 2d 1579.

No. 91–8268. ROSALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 91–8275. MELVIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 720.

No. 91–8276. MANNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 1238.

No. 91–8277. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 720.

No. 91–8288. HAMMACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 953 F. 2d 1449.

No. 91–8289. JACKSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 953 F. 2d 640.

No. 91–8290. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 91–8298. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 91–8299. RUIZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 950 F. 2d 724.

No. 91–8326. BELL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 593 So. 2d 123.

No. 91–1710. TOYOTA MOTOR CORP. ET AL. *v.* WOOD, JUDGE, 127TH JUDICIAL DISTRICT COURT, HARRIS COUNTY, TEXAS (HENRY ET AL., REAL PARTIES IN INTEREST). Ct. App. Tex., 1st Dist. Motion of Product Liability Advisory Council, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 91–7050. TAYLOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 947 F. 2d 1002.

JUSTICE WHITE, dissenting.

The Court of Appeals held that the Interstate Agreement on Detainers Act (IAD), 18 U. S. C. App. § 2, Art. IV(e), did not compel dismissal of the indictment against petitioner, who was taken from state custody in Massachusetts to Federal District Court on a writ of habeas corpus *ad prosequendum* for arraignment on an unrelated crime and returned to state custody the same day. The Courts of Appeals are divided as to the propriety of dismissal when technical violations of the IAD occur. Some courts take the First Circuit's view that such violations do not merit dismissal, see, *e. g.*, *United States* v. *Roy*, 830 F. 2d 628, 636 (CA7 1987), cert. denied, 484 U. S. 1068 (1988); *United States* v. *Roy*, 771 F. 2d 54, 60 (CA2 1985), cert. denied, 475 U. S. 1110 (1986); *Sassoon* v. *Stynchombe*, 654 F. 2d 371, 374–375 (CA5 Unit B Aug. 1981); but others do not, see, *e. g.*, *United States* v. *Thompson*, 562 F. 2d 232, 234 (CA3 1977) (en banc), cert. denied, 436 U. S. 949 (1978); *United States* v. *Schrum*, 638 F. 2d 214 (CA10 1981), aff'g 504 F. Supp. 23 (Kan. 1980). The Ninth Circuit has expressly recognized this conflict, and sided with the position taken

by the First, Second, Fifth, and Seventh Circuits. See, *e. g.*, *United States* v. *Johnson*, 953 F. 2d 1167, 1171 (1992).

One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country. The Court is surely not doing its best when it denies certiorari in this case, which presents an issue on which the Courts of Appeals are recurringly at odds. I would grant certiorari.

No. 91–7914. ROMERO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE BLACKMUN would dismiss the petition for writ of certiorari as moot.

No. 91–8336. COLEMAN *v.* THOMPSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would dismiss the petition for writ of certiorari as moot. Reported below: 966 F. 2d 1441.

No. 91–8341. BLACK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE BLACKMUN would dismiss the petition for writ of certiorari as moot.

No. 91–8361. BLACK *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would dismiss the petition for writ of certiorari as moot. Reported below: 962 F. 2d 394.

No. 91–8286. BAGGETT *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner to amend petition for writ of certiorari denied. Certiorari denied. Reported below: 954 F. 2d 674.

Rehearing Denied

No. 91–6866. HENLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 502 U. S. 1113;

No. 91–6994. MITCHELL *v.* RENFRO ET AL., 503 U. S. 910;

No. 91–7185. JEFFRESS *v.* PETERSON, COMMISSIONER OF INTERNAL REVENUE, ET AL., 503 U. S. 989;

No. 91–7360. YATES *v.* MCMACKIN, WARDEN, 503 U. S. 990;

No. 91–7384. DOERR *v.* EMERSON, 503 U. S. 990;

No. 91–7416. MCCULLOUGH *v.* KERSH ET AL., 503 U. S. 991;

No. 91–7419. MCCULLOUGH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 503 U. S. 991;

No. 91–7547. VAN WOUNDENBERG *v.* OKLAHOMA, 503 U. S. 993; and

No. 91–7793. GEURIN *v.* DEPARTMENT OF THE ARMY, *ante*, p. 924. Petitions for rehearing denied.

No. 91–370. PERRY *v.* SCHULZE, 502 U. S. 925. Petition for rehearing denied. JUSTICE THOMAS took no part in the consideration or decision of this petition.

JUNE 17, 1992

Dismissal Under Rule 46

No. 91–1717. DYNAMIC SEALS, INC., ET AL. *v.* SANDERS. Ct. App. Mich. Certiorari dismissed under this Court's Rule 46.

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